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HISTORY

OF THE

LAW OF REAL PROPERTY

IN

NEW YORK

AN ESSAY INTRODUCTORY TO THE STUDY OF THE

N. Y. REVISED STATUTES

(WITH APPENDICES)

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PREFACE.

THE casual reader of this volume may regard it as an undue emphasis of certain trite historical facts of no great significance in the practical application of the law of our own day. A perusal of the recent case of De Lancey *v.* Piepgras, 138 N. Y. 26, will tend to dispel this impression, for that case shows how complete the *nexus* really is between the old law and the new. It is quite true that the old law was perhaps unnecessary to the actual solution of De Lancey *v.* Piepgras, but it nevertheless received consideration there, and for the first time a point of Province law involved was determined in New York.

An attempt to trace the legal institutions of the England of the seventeenth century to their cis-Atlantic abode is followed by a more practical theme—the Revised Statutes—one of the most useful applications of the old common law to the institutions of America ever yet made. These celebrated statutes serve as the basis of the present law of real property, and their exposition by the great courts of this State contributes a body of law of infinite value to the particular jurisprudence of America.

In many instances cases will be found to be cited because they are deemed illustrative of the historical phase of the subject under consideration; but in the majority of instances only because they are decisive of the text. A multiplication of authorities has not been aimed at, as it always has seemed to the writer that there can be but one decision by a court of last resort, under the great fundamental doctrine of our jurisprudence, *stare decisis et non quieta movere.*

NEW YORK, March 27th, 1895.

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HISTORY

OF THE

LAW OF REAL PROPERTY

IN THE

STATE OF NEW YORK.

INTRODUCTORY REMARKS.

THE law of real property in New York prior to the War of Independence was in the main the contemporary English law relative to the socage tenure—the only tenure known in the province after the year 1664. Prior to that year the States-General of Holland had exercised certain rights of sovereignty over the settled portion of New York, then called New Netherland. While the Dutch were in possession of the province, such lands as were subjected to private dominion were in their incidents governed by the law of New Netherland. This system of law was in the main the law of Holland, the *Roomsch Hollandsche Recht*, but modified by the statutes of the West India Company—a corporation possessing in subordination to the States-General of Holland certain delegated powers of government. By virtue of the several treaties and arrangements under which the States-General abandoned the province of New Netherland to the English Crown, the Dutch owners of those lands in the province, already patented and held prior to 1664, acquired certain peculiar rights against the English sovereign. These rights, expressly reserved in articles of capitulation, were, however, insufficient to effect much change in the ultimate uniformity of the law of real property in the province of New York, although they did to a limited extent concern the devolution of title to particular pieces of property originally held under Dutch patents by former Dutch subjects, the *antenati*. In course of time the rights thus expressly reserved were extinguished, either by the death of the former Dutch proprietors, or by their voluntary submission to the new government. The precise mode in which these changes were accomplished is not obscure.

By the beginning of the eighteenth century the law of real property in New York had become uniform, and all

the land in the province was either held of the Crown by the common socage tenure, as finally reformed by the statute 12 Car. 2 c. 24, or else was in the hands of the Crown itself and subject to the English law regulating Crown lands. As the province of New York gradually acquired a definitive constitution and an organized government, the purely English law relating to the socage tenure was to some extent modified by local statutes or usages, of greater or lesser significance. But the changes made in the province of New York in the socage tenure known to the English law, were not extensive. So we may assume it as undoubtedly true, that at the outbreak of the War of Independence the law of real property in New York did not materially differ from the contemporary English law regulating the free and common socage tenure; yet the laws of the two countries did differ in some respects.

Neither independence nor the constitutions of the republican and the federal governments made at first great changes in our law regulating land. Not until 1829 was the law of real property reformed by the Revised Statutes of the State of New York. These celebrated statutes, as interpreted by judicial decision, are the basis of a new law of real property, and now afford a learning quite distinct from the former law. The changes thus instituted are not fully apparent without a comprehension of the law relating to the former socage tenure, for the terminology of the Revised Statutes involves the antecedent law. The new learning has had many competent expositors, and yet it is hoped that this essay may prove not altogether useless to the profession.

THE LAW OF REAL PROPERTY IN THE STATE OF NEW YORK.

CHAPTER I.

EUROPEAN LAW IN NEW YORK.

WHEN the great Powers of Europe, after the Columbian voyages, partitioned the New World among them, they acted on principles which their generation had gleaned from the classical jurists of Rome. The acts of prior discovery and occupation, which alone were held to confer on the Powers a title to the territory of the New World, were only refinements of the Roman law relative to the taking (*occupatio*) of ownerless or derelict property (*res nullius*).[1] In the practical application of these theories, this territory was regarded as *vacuum domicilium*, and the right of the aboriginal nomads to the possession of the soil was either ignored or else treated as *jus in re aliena*, a mere passive right which the Indians might cede by license of the great Power claiming the dominion over the territory, but not otherwise.[2] Even this right, reluctantly conceded to the Indians, was jealously guarded when the cession was made to a subject.[3] An Indian was presumed to be *inops consilii*.[4] The ancient status of the American aborigines affects them in modern law.[5]

[1] Maine's Ancient Law, Chap. viii.

[2] Johnson *v.* M'Intosh, 8 Wheat. 543; Worcester *v.* State of Georgia, 6 Peters, 515; Martin *v.* Waddell, 16 Peters, 367; Holden *v.* Joy, 17 Wall. 211; Buttz *v.* North. Pacif. R. R., 119 U. S. 55; Town of Southampton *v.* Mecox Bay Oyster Co., 116 N. Y. 1, 7; Seneca Nation *v.* Christie, 126 N. Y. 122, 136; Howard *v.* Moot, 64 N. Y. 262, 271.

[3] Jackson *v.* Wood, 7 Johns. 290.

[4] Jackson *v.* Wood, 7 Johns. 290; Chandler *v.* Edson, 9 Johns. 362.

[5] As the modern status of the Indians is beyond the scope of this essay, the authorities supporting the statement of the text will be found in Appendix No. III. this volume.

At a very early day, the States-General of Holland and the English Crown both claimed title to the territory now embraced in the State of New York. Disputes about the legal effect of discovery and settlements made at the embouchures of rivers penetrating far inland frequently occur in the division of new countries. In the year 1614 the States-General, by an *octroi*, or charter, to an Amsterdam company of merchants, granted the exclusive privilege to frequent for four voyages within three years after January 1st, 1615, the newly discovered lands "situated in America between New France and Virginia, whereof the sea-coasts lie between the fortieth and forty-fifth degrees of latitude." [1] This vague country was in this charter first called New Netherland, and its boundaries included the territory now New York. The *octroi* was followed in 1621 by another charter to the Dutch West India Company, which until the year 1664 exercised the local sovereignty over this large country. This corporation aggregate was in its powers, obligations, and attributes partly public, partly private. It had extensive though subordinate powers of government, and yet it was formed for the purpose of trading and profit to its shareholders.[2]

The West India Company under its charter colonized the country, planting Dutch subjects at the mouths of the great rivers and establishing there badges of its dominion. Until 1630 the border English made no encroachment on the territory claimed by the Dutch, although as early as 1621 the English ambassador at The Hague was directed to represent to the States-General that the Dutch settlements were in conflict with the right of the King of England, who, *jure primæ occupationis*, had good title to the country.[3] In 1632–33 the conflicting claims of the English and Dutch were sharply formulated in the diplomatic intercourse about the ship "Eendracht." [4] But from 1621 until 1664 the West India Company was permitted to go on with its project of colonization and government. The conduct of the English

[1] Documents relating to the Colonial History of New York, I., 11.
[2] Asher's Introduction: Amsterdam, 1854–67.
[3] Doc. rel. Col. Hist. N. Y., III., 6, 7, 8.
[4] *Ibid.*, I., 50, 58.

authorities during this period, though not uniformly acquiescent, certainly failed to indicate the rupture which ultimately ensued, for New Netherland was permitted to attain the dominion over a white population of ten thousand persons who were governed by the West India Company as the feudatory of the States-General.[1]

While the Dutch possessed the country, the nature of the government and the laws of New Netherland were, as in the case of most primitive colonies, determined by the institutions of the parent land. It has been well said that a colony is not a State; its government and institutions may be to some extent autonomous, but they are essentially *ab extra*, not *ab intra*. The powers of the West India Company depended on its charter from the States-General, which reserved to itself a certain superintending and appellate jurisdiction over the colonists of New Netherland, inhibiting its feudatory—the West India Company—from enacting laws contrary to the spirit of the jurisprudence of the fatherland. The nature of the dominion of the West India Company must be sought in the Dutch seigniorial system, for it was treated by the Dutch statesmen and jurists as a seigniorial feud, or a fief of nobility, of which the West India Company was the patroon, being invested with the arms of a count and a somewhat extended seigniorial jurisdiction.

The lands of New Netherland were primarily vested in the company, having been acquired by it under its charter, either by grant from the Indians or as derelicts.[2] Portions of these lands were again granted by the company to colonists, sometimes in the name of the States-General, the Prince of Orange, and the managers of the West India Company, and at others in that of the local director of the West India Company, but on condition that the grantee acknowledge the company as patroon.[3] Where

[1] A more full discussion of this event, accompanied by many citations of authority, is contained in the Historical Introduction to the Reprint of Bradford's (1694) N. Y. Laws, by the Grolier Club in 1894, the bicentennial of that publication.

[2] Historical Int'd. to the Grolier Reprint of Bradford's 1694 Laws, XXX.

[3] Doc. rel. Col. Hist. N. Y., XIII., XIV., *passim*; Hoffman's Treatise upon

the land was in the actual possession of the Indians, the colonists were required to procure a ground brief or license from the company before the same could be purchased of the Indians, or else a confirmation of an Indian grant taken without license;[1] but a failure to procure such an original grant from the Indians, did not *per se* invalidate a patent issued under the authority of the European power, which claimed the soil as its own,[2] whether such claim was in right of discovery and occupation or by cession from the original European discoverer. The Dutch colonists then held the lands of the West India Company as patroon. The incidents of such tenure were primarily regulated by ordinances of the company, and in the absence of such regulations they were substantially determined by the law of Holland, which was by various edicts and commissions made the common law of New Netherland.[3] Useful outlines of this system of jurisprudence may be found in the English translations made for the use of English barristers practising before the Privy Council or in the Dutch dependencies of England.[4]

About the year 1628 the Dutch West India Company, with the assent of the States-General, determined to encourage private colonies in New Netherland, the patroons of which were to be vested with seigniorial government within their colonies. In furtherance of this scheme, the Charter

Estate, etc., of the City of New York, II., 44; de Lancey's N. Y. Manors, 50, 51.

[1] Doc. rel. Col. Hist. N. Y., I., 37, 56, 84; Duke of York's Book of Laws (Penna. edit.), 418; Doc. rel. Col. Hist. N. Y., II., 557; Laws and Ordinances of New Netherland, 9. *Vid.* Lecture LI., 3, Kent's Com., for a full exposition of this subject.

[2] Jackson *v.* Hudson, 3 Johns. 375, 384; Fletcher *v.* Peck, 6 Cranch, 87; Mitchel *v.* U. S., 9 Peters, 711, 748; Holden *v.* Joy, 17 Wall. 211; Beecher *v.* Wetherby, 95 U. S. 517.

[3] Doc. rel. Col. Hist. N. Y., I., 161, 178, 251; XIV. *id.* 234, 251, 437, 438, 551; Laws and Ordinances of New Netherland, 400, 478; Int'd. to Grolier Bradford, XX.; Dunham *v.* Williams, 37 N. Y. 251, 253; Denton *v.* Jackson, 2 Johns. Ch. 320, 324; Van Giessen *v.* Bridgford, 18 Hun, 73; s. c. 83 N. Y. 348.

[4] Grotius' Introduction to Dutch Jurisprudence, Capetown, 1878; Institutes of the Laws of Holland, by Johannes Van der Linden, LL.D., London, 1828; Commentaries on the Roman-Dutch Law, by Simon Van Leeuwen, LL.D., London, 1820; also another edition in two volumes by Kotzé, London, 1881.

of Freedoms and Exemptions was promulgated,[1] whereby any member of the company (amended in 1640[2] to *any inhabitant of New Netherland*) who might undertake to plant "a colonie" of fifty persons should possess certain seigniorial privileges prescribed in the charter and well known to the Dutch law relating to feuds. Under the charter seven patroonships, or Dutch seigniories, were founded before the West India Company determined that the separate jurisdictions thus created were a mistaken policy. Only two of these patroonships, that of van Rensselaer, in the valley of the upper Hudson, and that of van der Donck, at Yonkers, survived the English conquest in 1664. The estate and privileges thus offered to the patroons were not of the ancient feudal type, but resembled those in Holland then known as good feuds, or feuds which had been so modernized as to prevent harsh incidents, escheats, and reversions to the patroon. The "colonies" of the patroons were made common sub-fiefs without any title of nobility attached to them. They all lay within the greater fief of New Netherland, although the patroons did not at first desire to recognize the West India Company as the source of their jurisdiction and their mesne lord, notwithstanding that the Charter of Freedoms and Exemptions of 1629[3] (amended in 1640[4]) expressly declared that the sub-fiefs of the patroons were to be holden of the company. The substance of the rights of the patroons of these Dutch seigniories is to be found in the charters last mentioned. It was taken from the contemporary law of Holland relating to common mesne or sub-fiefs, held without any noble titles or dignities attached to them and without any incidents of nobility.[5] By the charters the patroons were given the right to dispose of their fiefs by will—*venia testandi.*[6]

The creation of the patroonships did not interfere with the grants to private persons of the lands acquired by the

[1] Laws and Ord. of New Neth., 1.
[2] Doc. rel. Col. Hist. N. Y., I., 119.
[3] Section vi.
[4] Doc. rel. Col. Hist. N. Y., I., 120.
[5] See Jus Feudi, Van Leeuwen's Roman Dutch Law, I., chaps. xiv., xv., xvi., and xvii., citing Grotius, II., 41, 42, 43.
[6] Doc. rel. Col. Hist. N. Y., I., 119.

West India Company. By the terms of the charter[1] the private Dutch colonists might pre-empt as much land as they could improve. The number of the grants of every kind made by the Dutch Government is said to be about six hundred and thirty-eight.[2] By the beginning of the year 1664 New Netherland possessed a population of some seven to ten[3] thousand colonists under an organized government of the kind denoted. The inhabitants lived in villages or on outlying farms, then called bouweries[4] or kraals.[5] The waterways furnished the inhabitants with cheap and natural means of communication, but there were highways already in existence,[6] and in the villages and the capital of New Netherland streets[7] or public ways (*viæ publicæ*) were already established and the law concerning these remains of practical interest in a few cases.[8] The estates held by the colonists were treated as permanent feuds of inheritance, and were subject to the incidents of feudal property under the Roman-Dutch law ; yet they held their property as if it were alodial,[9] this being one of the reforms then familiar in the law of Holland.[10]

By the year 1662 the settlements of New Netherland began to prosper, and again attracted the attention of the English, who hastened to revive their dormant pretensions to the territory called New Netherland, and for forty years occupied and governed by the Dutch. Although England and Holland were then at peace, and the Dutch in actual possession of the territory, on March 12/22, 1664, King Charles II. granted to his brother, the Duke of York and

[1] Laws and Ord. of New Neth., 8 ; Doc. rel. Col. Hist. N. Y., I., 119.

[2] De Lancey's N.Y. Manors, 66 ; O'Callaghan's Hist. of New Neth., II., Appendix M.

[3] Critical and Narrative History of America, III., 385 ; Brodhead's History of N. Y., I., 734.

[4] 2 R. L. of N. Y., Appendix No. I.

[5] So called in Jackson *ex dem. v.* Rogers, 1 Johnson's Cases, 33, 46.

[6] Dunham *v.* Williams, 37 N. Y. 251.

[7] Hoffman's Estate, etc., Corp. N. Y., I., 302, 305, 330.

[8] Bartow *v.* Draper, 5 Duer, 130, 142 ; Story *v.* Elevated R. R., 3 Abb. N. C. 478, 489 ; cf. Mortimer *v.* N. Y. El. R. R. Co., 6 N. Y. Supplement, 898 ; 57 N. Y. Super. Ct. R., 509 ; Hine *v.* N. Y. El. R. R. Co., 7 N. Y. Supp. 464.

[9] Doc. rel. Col. Hist. N. Y., I., 120.

[10] Van Leeuwen's Roman-Dutch Law, I., 258.

Albany, all the territory so occupied or claimed by the Dutch.[1] The legal nature of this grant is of importance in any consideration of our subject, and at a subsequent stage will be noticed.[2] Armed with this patent and the vice-regal authority it contained, the Duke of York, as Lord High Admiral of England, quickly dispatched a naval force to subdue New Netherland. On August 27th, (old style), 1664, the city of New Amsterdam, the capital of New Netherland, capitulated to the English under formal and regular articles of capitulation.[3] In September following Fort Orange (Albany) surrendered, and a little later the Delaware country capitulated under separate articles.[4] Not until February 22d, 1665, did King Charles II. formally declare war against the States-General. During the entire war New Netherland remained in possession of the English, who called it New York, and by an *uti possidetis* clause of the treaty of peace signed at Breda, July 21/31, 1667, the province was formally ceded to the English Crown[5] in exchange for Surinam.[6]

The question whether the English secured a title to New York through this treaty, following their conquest of 1664, or through the right of discovery and prior occupation, has been very perplexing to common law lawyers, and has been variously decided, although it seems now not to be a practical question. It is certainly one which the governments interested decided for themselves upon principles which it is too late to reopen for discussion, even if such discussion were within the province of judicatories.[7] The title of King Charles II. to the easterly end of Long Island in no event

[1] By reason of the difficulty of finding this patent in print, it is given in full in an Appendix, No. I., to this volume; Doc. rel. Col. Hist. N.Y., II., 295; Martin *v.* Waddell, 16 Peters, 367; the Pea Patch Island Case, 1 Wall. Jr. U. S. Cir. Ct. Rep., Appendix No. II.

[2] *Infra*, p. 11.

[3] R. L. of N. Y., *anno* 1813, II., Appendix I.

[4] Doc. rel. Col. Hist. N. Y., III., 69, 71.

[5] For the text of the treaty, see Dumont, Corps Diplomatique, VII., 44.

[6] This treaty was discussed by Mr. Jean De Witt in 1699. See his discourse in Chalmers' Colonial Opinions, p. 744, Amer. edit.

[7] *Infra*, p. 65, and see the authorities cited in the Grolier Bradford's N. Y. Laws of 1694, Int'd., chap. I., pp. iii., iv.

depends on either conquest or cession, for it was never claimed by the Dutch.[1]

The historical documents relating to the pretensions of the English to New Netherland conclusively show that Charles II. determined, entirely irrespective of the validity of his claims to the territory by right of discovery, to subdue New Netherland; but in order to neutralize such a flagrant breach of the law of nations, the English admiral, who accomplished the expulsion of the Dutch authorities, was for a time after his return committed to the Tower to await the consequences of his act; and, had the issue of the subsequent Dutch War been otherwise than it was, according to the opinion of the time the admiral would have been made a vicarious sacrifice to placate Dutch indignation.[2] The excuse for this repetition of historical facts is the large place that this occurrence has usurped in judicial decisions bearing on our subject.

King Charles II. never had actual possession of New Netherland, when prior to his reduction of the territory he granted it to the Duke of York. The latter, being a subject, held the territory of the Crown, on the terms and tenure of his patent, which was as of the King's Manor of East Greenwich and "our County of Kent in free and common socage and not *in capite*, nor by knight service Yielding and rendering."[3] In this way New York first received the common, or non-feudal, socage tenure as it stood in England in the year 1664. The right of the Crown to grant Crown lands to the Duke of York, if we assume that the Dutch were intruders thereon, was then clear by the settled principles of English law.[4] In the early history of American colonization the king was regarded as possessed of the English territories in America, as of his own demesne;[5] a doctrine which subsequently gave way to the principle that he was seised thereof *in jure coronæ*.[6] It was a settled rule of the law of

[1] Town of Southampton *v.* Mecox Bay Oyster Co., 116 N. Y. 1, 7.

[2] See Pepys' Diary, Vol. IV., 287, 306.

[3] Doc. rel. Col. Hist. N. Y., II., 296; Penn *v.* Lord Baltimore, 1 Ves. Sr. 444; Appendix No. I., *infra*.

[4] Martin *v.* Waddell, 16 Peters, 367.

[5] Pownall, Administration of the Colonies, 48.

[6] *Ibid.*, 139.

England that by his prerogative the king was the universal occupant, and entitled to all derelict lands[1] in his dominion, and had the right to grant them at his pleasure or by his authorized officers.[2] The fact that the grant to the Duke of York was made before the Crown's possession of the territory in question, and while it was occupied by the Dutch, ultimately raised doubt[3] about his title, and led to another grant to him in the year 1674.[4]

The Duke of York's grants or patents conformed to the theories of the law advisers of the Crown, and were closely associated with well-established precedents. They were more than mere grants of territory,[5] as they conferred on the grantee certain delegated regalities and powers of government over the inhabitants. They were not the inventions of their draftsmen. Precedents were found in the frame of government of the old counties palatine of England and Ireland,[6] which enjoyed a quasi-independent but subordinate government, and also in the form of government enjoyed by the English remnant of the Duchy of Normandy, the islands of Jersey and Guernsey,[7] which were outside the realm and beyond seas, and therefore presumed to offer closer analogies for the frame of colonial governments. A proprietary government was only a feudal seigniory of a certain type.[8] The first royal patent to the Duke of York was therefore of a twofold character: it was a grant, or conveyance of lands from the Crown,[9] and a franchise of a political nature.[10] As a grant it is the source of all the English titles in New York, originating prior to the accession of James II., when the ungranted lands became Crown lands and subject to a new set of legal principles. This distinction

[1] Bacon's Abr. Tit. "Prerogative," B.

[2] Mitchel *v.* U. S., 9 Peters, 748.

[3] The Pea Patch Case, 1 Wall. Jr., Appendix, cxxvii.

[4] *Infra*, p. 16.

[5] Martin *v.* Waddell, 16 Peters, 367.

[6] Case of the County Palatine of Wexford, Davies' Report (Irish), 159; Madox's Baronia Anglica, 150, "Comes Palitinus."

[7] Pownall's Colonies, 60.

[8] Penn *v.* Lord Baltimore, 1 Ves. Sr., 444; Case of the County Palatine of Wexford, Davies' Report (Ir.), 159.

[9] Cf. 2 Bla. Comm., 346.

[10] 1 Bla. Comm., 109; Chitty's Prerogatives of the Crown, 31.

is not always noticed in the deductions of ancient titles in New York.

The patent to the Duke of York was in terms operative to pass rivers and navigable streams within the territory. The right of the Crown to grant the rivers, havens, and shores of the sea, together with the subaqueous territory, was regarded, notwithstanding Magna Charta, as clear,[1] but the proprietor took them subject to the *jus publicum*, or, as the king himself held them, according to the jurisprudence of England.[2] Titles thereto deduced from the proprietor remained subject to the common law rights of the public.[3]

Before the king had made these several grants to the Duke of York the feudal system of England had been greatly modified by statutory reforms. Formerly the Duke of York would have been tenant *in capite* of the king and he would have held the province by tenure in chivalry *ut de corona*,[4] the king possessing the wardship of the lands; but in 1660, by the Statute 12 Car. II. c. 24,[5] it had been enacted that all tenures thereafter created by the king should be in free and common socage and not by knight service or *in capite*.[6] The proprietary governments created by the Crown were only modified fiefs of the Crown, in which the proprietors had certain *jura regalia*, such as were formerly attached to the old counties palatine.[7] It is, however, unnecessary to pursue the nature of the duke's government further than it relates to the tenure by which the Duke of York held the province. The feudal system never prevailed in New York, having been abolished in England[8] before New York was subjected to the English dominion.

[1] Hale's "De Jure Maris," 14, 17, 18; Trustees of Brookhaven *v.* Strong, 60 N. Y. 56, 64; Mahler *v.* Transportation Co., 35 N. Y. 352, 356.

[2] Martin *v.* Waddell, 16 Peters, 369; see this subject generally treated in Shively *v.* Bowlby, 152 U. S. 1; Lowndes *v.* Huntington, 153 U. S. 1.

[3] De Lancey *v.* Piepgras, 138 N. Y. 26, 37.

[4] Case of the County Palatine of Wexford, Davies (Ir.), 159, 181.

[5] Overbagh *v.* Patrie, 8 Barb. 28, 40; 6 N. Y. 510.

[6] This expression, not "*in capite*," is criticised: Co. on Litt. Notes to 108*a*.

[7] 1 Bla. Com., 107; Chitty's Prerog. of the Crown, 31; De Lancey *v.* Piepgras, 138 N. Y. at p. 37; Penn *v.* Lord Baltimore, 1 Ves. Sr. 444; Case of the County Palatine of Wexford, Davies (Ir.), 159; Madox's Baronia Anglica, 150.

[8] 12 Car. II., c. 24; People *v.* Van Rensselaer, 9 N. Y. at p. 338; Van Rensselaer *v.* Smith, 27 Barb. at p. 149; *et infra*.

When the English took possession of the province they found that those lands already reduced to private possession were largely in the hands of the Dutch, although certain Englishmen had under the Charter of Freedoms and Exemptions taken up lands,[1] which they held of the West India Company as patroon.[2]

Efforts to conform the former tenures to the duke's patent were immediately made by the duke's governor, who was invested with the law-making authority. In 1664 the first English code, called the "Duke's Laws,"[3] required all former owners to bring in their grants and take out new patents "from the present governoure in the behalf of his Royall Highness, the Duke of Yorke." This law was often repeated.[4] The reason assigned for the change was that "several townes and persons within this government, as well English as Dutch, do hould their Lands and houses upon the Conditions of being subjects to the States of the United Belgicke Provinces, which is contrary to the Allegiance due to his Majestie."[5] The precise mode in which the change in the tenure of lands was accomplished may be ascertained by an examination of the governor's confirmation of a Dutch transport. Examples of such instruments in one form or another are readily accessible to the inquirer after them.[6]

The statutes,[7] relative to the confirmation of the Dutch patents, and the deed of formal confirmation from the duke's governor, followed by an actual attornment occasioned by the payment of quit-rents to the new lord proprietor,[8] had the effect of converting, in fact as in law, all the Dutch

[1] Laws and Ord. New Neth., 27; O'Callaghan's New Netherland, II., Appendix M.

[2] Amendment of 1666 to Duke's Laws of 1664.

[3] Title "Lands."

[4] Amendments of 1665 and 1666 to Duke's Laws.

[5] Amendment of 1666 to Duke's Laws; Record of N. Y. Court of Assizes, March 25th, 1667, p. 443.

[6] Hoffman's Treatise upon the Estate, etc., of the City of New York, II., 44, 46; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 699; Jackson *ex dem.* *v.* Murray, 7 Johns. 5.

[7] Cited *supra* as Duke's Laws.

[8] Reports of Surveyor-General of N. Y. in 1732 and of the Governor of N. Y. in 1749; Doc. Hist. of N. Y., I., 375, 749.

tenures in New York into the tenure in free and common socage prescribed by the duke's patent from Charles II. Thereafter, in contemplation of law, there could be no further Dutch tenures.[1]

The conquest operated in itself to change the lord paramount of all the former fiefs in New Netherland. Independently of this, as the Duke's Laws required the Dutch patents to be confirmed under penalties for their non-confirmation, the presumption of law is, that all the Dutch owners complied with the requirements of the Statute: "*Omnia præsumunter rite esse acta donec probetur in contraria.*" This is especially true now after so great a lapse of time. The consideration of these facts would be of little importance, were it not that the courts of justice of New York have in this century treated certain easements connected with the ancient Dutch holdings as if in law they were quite different from like easements connected with those lands which were patented only after the year 1664. But this distinction will be noticed at a subsequent place.[2]

The introduction of the socage tenure in the manner pointed out would, with all the contemporary incidents of that tenure, have been unqualified after the year 1664, had it not been for the articles of capitulation signed by the Dutch and the English on August 27th of that year.[3] The articles of capitulation were entirely within the province of military commanders, and did not require the sanction of their respective sovereigns.[4] By these articles the Dutch were guaranteed "their own customs concerning their inheritances."[5] A subsequent naturalization of the Dutch *antenati*, however, followed. Naturalization would have

[1] But see People *v.* Clarke, 10 Barb. 120, 141. The Dutch grants to towns were confirmed after the conquest. Denton *v.* Jackson, 2 Johns. Ch. 320; North Hempstead *v.* Hempstead, 2 Wend. 109. These grants were confirmed according to the Duke's Laws.

[2] *Infra*, p. 65.

[3] Appendix No. I., 2 R. L. of N. Y., *anno* 1813; Doc. rel. Col. Hist. N. Y., II., 250.

[4] Wheaton's Elements of International Law, 473; Chitty's Prerog. of Crown, 29.

[5] Art. XI.

destroyed the status of the Dutch *antenati* under the articles of capitulation, had it not been for a written declaration of the duke's governor to the contrary.[1] This declaration was probably in law a mere sponsion.

On July 30th, 1673, the Dutch conquered New York, and during an interval of fifteen months again occupied the province, restoring their own laws as far as possible; but under the sixth article of the Treaty of Westminster, signed February 9/19, 1674, the province was finally surrendered to the English.[2] On November 9th, 1674, the duke's governor issued a proclamation confirming "all former grants, privileges, and all estates legally possessed by any under the Duke of York before the late government."[3] This was in accord with the law of postliminy, the intervening conquest operating as a mere suspension of rights. By reason of this proclamation the Dutch *antenati* were assumed to have preserved their rights under the articles of capitulation of 1664.[4] A subsequent and general act naturalizing all residents of foreign birth, passed in 1683,[5] probably avoided the necessity of resorting to the guarantees of the articles of capitulation. At all events, when the distinction between the conquered and the conquerors ceased, the articles fell into desuetude, except in so far as they related to the division of inheritances among the Dutch and to the property and the government of the Reformed Dutch Church. To this extent, and *ex gratia*, the Dutch enjoyed a privileged status for some time after the year 1674.[6]

By the Treaty of Westminster, in 1674, the right of the English Crown to the province again rested on a distinct surrender and cession by the Dutch. In order to quiet the title of the Duke of York, Charles II. now again granted to

[1] Doc. rel. Col. Hist. N. Y., III., 74; Sons of Liberty in N. Y., pp. 14, 16.

[2] Dumont, Corps Diplomatique, VII., 253; the seventh clause confirms the Treaty of Breda.

[3] Doc. rel. Col. Hist. N. Y., III., 227.

[4] *Ibid.*, V., 495.

[5] MS. roll State Library, Albany, N. Y.

[6] Van Schaack's Laws N. Y., I., 83, 97; Collections of N. Y. Hist. Society for 1868, p. 183; but see Humbert *v.* Trinity Church, 24 Wend. 587, 624; Canal Commissioners *v.* People, 5 Wend. 423, 446. *Vid.* Int'd. to the Grolier Bradford's N. Y. Laws of 1694, xlix., xcix., for further discussion of these articles; and *infra*, p. 64.

him a new patent[1] in almost the same phraseology as that of 1664. This second grant cured all the original defects in the first patent, which had been made when the province was held by the Dutch adversely and as a fief of the States-General of Holland. The lord proprietor now caused the "Book of Lawes," known as the "Duke's Laws," to be promulgated throughout the province, and in both the English and the Dutch portions. The sections of this code relating to real property, with few exceptions, only affirmed rules of law otherwise in force as relating to the English socage tenure. As the Duke of York held the province by the socage tenure, all the incidents of that tenure became the fundamental law of real property in New York,[2] without the necessity of any supplementary legislation, in the New York "Book of Lawes." The "Book of Lawes" of 1664 declared that no sale or alienation of lands should be holden good in law, "except the same be done by Deed in writing, under hand and Seal, and delivered and possession given upon part, in the name of the whole." . . . "Unless the deed be Acknowledged and Recorded, according to law."[3] No conveyance was good where the grantor remained in possession, except against the grantor and his heirs, unless the deed was recorded.[4] This provision, at first confined to Long Island, then the more populous part of New York, doubtless became general after 1674, when the Duke's Laws were again put in force.

Thus prior to the Statute of Frauds (29 Car. II., c. 3) estates in socage lands could not be conveyed in New York by livery of seisin without deed under seal acknowledged and recorded under the Duke's Laws.[5] The Duke's Laws prescribed the forms of deeds creating an estate of inher-

[1] Leaming and Spicer's N. J. Grants, 41; Martin *v.* Waddell, 16 Peters, 367; Chalmers' Col. Opin., 76, 77; Pea Patch Island Case, 1 Wall. Jr., U. S. Cir. Ct. R., Appendix, p. cxix.; People *v.* Livingston, 8 Barb. 291; Corfield *v.* Coryell, 4 Wash. Cir. Ct. R. 371; Mahler *v.* Transportation Co., 35 N. Y. 352, 356.

[2] Canal Commissioners *v.* The People, etc., 5 Wend. 423, 446; 17 Wend. 571, 587; Humbert *v.* Trinity Church, 24 Wend. 587, 623.

[3] Duke's Laws of 1664; Title, "Conveyances, Deeds, and Writings."

[4] *Ibid.*

[5] *Infra*, p. 19.

itance, or an estate tail; but the nature of such legislation will be hereafter considered.[1] A resolution of the assembly of 1691 declaring all prior laws under the Duke of York void,[2] if it was effective in law, left the province without any law requiring conveyances of estates of freehold to be in writing. The Statute of Frauds,[3] as it was passed in England only in 1677, had strictly no force here.[4] It was nevertheless incorporated in the New York Revision of 1787 by Messrs. Jones and Varick, who were confined to such statutes of England as were in force in the province of New York.[5]

Under the lord proprietor the freeholders of the province chose the first legislative assembly, which sat in the years 1683, 1684, and 1685.[6] Several important statutes affecting real property were passed by these assemblies. That one known as the "Charter of Libertys of 1683" evidently contemplated a change regarding inheritances, and attempted to make the devolution of titles to land altogether dependent on the customs and practice of England, notwithstanding the articles of capitulation to the contrary.[7] Under this act estates of *femes covert* could be conveyed only by deed, acknowledged in some court of record, "she being secretly examined if she doth it freely."[8] But this statute was of brief operation, being disallowed by the Duke of York.[9] Under "an act of settlement" passed November 2d, 1683, those who had lost their deeds, but were in actual possession for four years of lands, without any adverse claim thereto, were declared the owners of such lands after fifteen months. "An act to prevent frauds in conveyanceing of lands," passed November 3d, 1683, declared that after December

[1] *Infra*, p. 58. [2] *Infra*, p. 21. [3] *Supra*, p. 16.

[4] The Statute of Frauds first made writings essential to the transfer of freehold estates.

[5] Sec. 35, Const. of 1777; 1 J. & V., 281.

[6] Trustees of Brookhaven *v.* Strong, 60 N. Y. 56, 68; Burtis *v.* Burtis, 1 Hopkins Ch., p. 563.

[7] *Supra*, p. 15.

[8] Constantine *v.* Van Winkle, 10 N. Y. 422; 6 Hill, 177; Jackson *ex dem.* Woodruff *v.* Gilchrist, 15 Johns. 89, 113; Humbert *v.* Trinity Church, 24 Wend. 587, 625; Albany Fire Ins. Co. *v.* Bay, 4 N. Y. 1, 23.

[9] Albany Fire Ins. Co. *v.* Bay, 4 N. Y. 1, 24; Doc. rel. Col. Hist. N. Y., III., 357, 370.

25th, 1683, no conveyance of lands, where the consideration exceeded fifty pounds, should be of any force or validity in law, unless such conveyance be acknowledged, entered, and recorded in the county where such lands "doe lye, within six months after the day of their respective dates." An act of October 22d, 1684, declaring "of what age Lands may be passed away and Guardians chosen," also provided that all persons of the age of twenty-one years might devise their lands. The Duke's Laws of 1664 had distinctly recognized the power of making wills as one then existing in fact,[1] and such recognition accorded with the law in force; for by Statute 32, Henry VIII., c. 1, socage lands were in England devisable, and this statute was in force in New York as part of the law of the socage tenure, introduced by the Duke of York's patent. The socage tenure then introduced in New York the antecedent English law relative to that tenure, including the power of devising lands.[2] The articles of capitulation reserved the right to will lands of the *antenati* according to the former Dutch law;[3] but, as already stated, this right ultimately lapsed, and the law relative to the English socage tenure thenceforth prevailed in New York.

In 1684 was passed "An act for quieting of men's estates," etc., which directed that no resident of full age and *sui juris* should thereafter make any entry on real estate, but within "seven yeares" after the right accrued, and in default of such entry within that time, such person was excluded from such entry.[4] These were brief periods for prescriptions or limitations, but at that time the great desire was to quiet the titles disturbed by the several recent wars. Possession in new countries is allowed to play an important part in the acquisition and even in the devolution of title to real property.[5] The only other acts of this period

[1] Title "Administration;" Jackson *ex dem.* Smith *v.* Hammond, 2 Caine's Cases, 337.

[2] Jackson *ex dem.* Smith *v.* Hammond, 2 Caine's Cases, 337; Co. on Litt., 111, B., Note 4.

[3] *Supra*, p. 14.

[4] Compare Act of Oct. 30th, 1710, 1 L. & S. 84, chap. ccxvi., and the English act, 21 Jac. I., c. 16.

[5] Chancellor Livingston in Street's "Council of Revision," p. 225.

necessary for us to consider are entitled "A Bill concerning former Mortgages," and "A Bill to prevent Deceipt and fforgerye," passed in October, 1684. The former act validates certain mortgages and recites the custom of the ancient inhabitants of this province, commonly called Dutch, to use and exercise the methods of their own nation in making mortgages of lands, which is not according to the usage and method of England and the "now established lawes of this province." The "Act to prevent frauds in conveyanceing of Lands" declared "that no grants, deeds, mortgages, or other conveyances whatsoever of any lands or tenements within this province shall be of any force, power, or validity in Lawe, unless entered and recorded in the Register of the County" where situated. Before recorded they were to be acknowledged before a justice of the peace or proved by sufficient witnesses, and certificate thereof endorsed on such instrument. The "Bill to prevent Deceipt and fforgerye" amplified the "Act to prevent frauds in conveyanceing of Lands."

On February 6th, 1685, the Duke of York ascended the throne as King James II. The legal effect of the accession of the lord proprietor was to merge his private estate in his Crown. In other words, he continued to be possessed thereof only *in jure coronæ*.[1] The province was no longer vested in him, in his own right, but in some manner it was annexed to the Crown, and went with it, as the franchises, liberties, and jurisdiction thereof, when they came to be in the hands of him that had the crown and jurisdiction royal, were extinguished by the common law.[2] Thenceforth the province was a Crown province; the king was the lord paramount,[3] and all titles to lands were derived from him.[4] As the possessor of all vacant lands not granted to any individual, the Crown itself was subject to certain rules of law touching the alienation of Crown lands, which must be

[1] Comyn's Dig. Tit., "Prerogative;" Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633, 726.

[2] Duchy de Lancaster, Plowden, 212; Calvin's Case, 7 Reports, 12; the Banker's Case, Skinner, 601, 603; Doc. Hist. N. Y., I., 380, 753; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633, 726.

[3] Co. on Litt., 65*a*.

[4] People *v.* Livingston, 8 Barb. 276; People *v.* Trinity Church, 22 N. Y. 46.

secundum jus coronæ;[1] but the Crown might delegate generally to the governors of the province by a commission under the great seal the right to convey Crown lands. In practice this was the mode of alienation generally employed in New York before the War of Independence.[2]

In October, 1688, William of Orange landed in England, and in December James II. fled the realm. The Convention Parliament resolved by the Declaration of Rights that William and Mary, Prince and Princess of Orange, should be declared King and Queen of England during their joint lives, but with the administrative power in the king. By this act the succession to the Crown was settled on the posterity of Mary, and then on that of Anne. Thus New York, with the other plantations, passed to the new sovereign for Crown provinces as *concomitantia* of the Crown pursued the line of devolution prescribed for the Crown.[3] The legal effect of the English Revolution was analogous to the demise of the Crown; its prerogatives remained as before, but the right of the new sovereigns to exercise them was deduced from the convention of 1688.[4]

In 1691 the Crown finally gave to the inhabitants of New York a share in their own government,[5] and the right to elect representatives to a legislative assembly. The legislative power was thenceforth definitively vested "in the Governor, with the consent of the Council and the Assembly, or the major part of them." But there was an extensive limitation imposed on this right of legislation, for all laws were to be "as near as might be agreeable to the laws and statutes of the Kingdom of England." In practice the Parliament of England exercised the right of extending the operation of its own acts to New York and other plantations.[6] But the Assembly of New York after 1691 was the main source of legislation, and to it we look for those modifications of the law of real property which were made prior to New York's independence of the Crown.

[1] Chitty's Prerogatives of the Crown, 205.
[2] The People *v.* Livingston, 8 Barb. 253, 276; and see p. 35, *infra*.
[3] Chitty's Prerogatives, 205.
[4] Hallam's Const. Hist., III., 95; Macaulay's England, II., 497, 507; III., 26.
[5] Doc. rel. Col. Hist. N. Y., III., 623.
[6] See Int'd to Grolier Bradford's N. Y. Laws of 1694, p. xcvi.

It has been shown in what way the socage tenure was introduced in New York, and with it came all the antecedent English law relating to such tenure, excepting the law relating to remedies and procedure, which was established here generally by conferring on the courts of New York the jurisdictions and the powers of the ancient courts of England.

The extent of the early statute law of New York is much affected by the resolution of the lower house of the first assembly, held in the reign of King William and Mary.[1] This resolution purports to declare all the laws consented to by the General Assembly under the Duke of York void. The declaration, together with the custom of including no laws earlier than 1691 in the various revisions of the provincial laws, has occasioned some doubt about the extent of the early statutes of the province. What could then be the legal effect of this resolution of a single chamber? If it is to be regarded as effectual in law, then the acts of the New York Assembly begin only with the year 1691. If, on the other hand, the resolution is to be disregarded as *ultra vires* of the Lower House, the systematic legislation prior to the year 1691 is to be taken as part of the law of the province. The effect of this resolution is much debated, but the tendency of the modern courts is to treat it, at least, as evidential of a repeal.[2] There is much to be said on both sides, although in the provincial period, the resolution was no doubt inofficious if judged by the law of England.[3] Many of the laws of 1683, 1684, and 1685 were probably repealed, either expressly or by implication, by subsequent legislation.[4]

[1] Journal N. Y. Assembly, April 24th, 1691, p. 8.

[2] Jackson *ex dem. v.* Gilchrist, 15 Johns. 89; Constantine *v.* Van Winkle, 6 Hill, 177, 181; Van Winkle *v.* Constantine, 10 N. Y. 422, 426. But see Brookhaven *v.* Strong, 60 N. Y. 68; Burtis *v.* Burtis, 1 Hopkins Ch. at p. 563, and Humbert *v.* Trinity Church, 24 Wend. 587, 625.

[3] See the authorities cited and this question debated in the Historical Intro. to Grolier Reprint of Bradford's 1694 N. Y. Laws, p. lxxviii. *et seq.; et infra*, Chap. II.

[4] But not all these laws were repealed by implication—*e.g.*, the early marriage laws of New York prior to 1691 were made the basis of Sir James Maitland's contest in the Matter of the Lauderdale Peerage, 17 Abbott's N. C. 439; L. R. 10 Appeal Cases, 692. But the House of Lords was not com-

By the terms of the royal commissions to the Crown governors, the acts of the Assembly, when enacted and approved by the governors, were valid until disallowed by the Crown.[1] They ceased to be operative when disallowed, being then void by the very authority under which the Assembly existed.[2] The Legislature of an English province had no prescriptive jurisdiction like that of Parliament, but owed its energies to the Crown's franchise alone.[3]

Although subsequent to 1674, it was not essential to a determination of the rights of socage tenants, and the right of the Dutch inhabitants stood on quite a different legal footing,[4] the courts have often had urged on them a discussion of a profound abstract and political question: Was England's title to New York derived through the right of discovery and occupation, or by means of conquest and cession?[5] The solution of this great question is sometimes deemed pertinent to the original application of the English common law in New York; for the English commentators on the text of the law distinguish, in this respect, conquered countries from countries acquired by discovery and occupation. They affirm that the common law of England is set in force by legislation only in conquered countries, and intimate that it is in force without any legislation, enactment, or ordinance, in the other class of countries.[6] Unfortunately their figurative language has crept into adjudicated cases, although the accuracy of their distinction is wholly denied by later jurists. The early English cases certainly

pelled to adjudicate the legal effect of the resolution, as the decision rested on other points.

[1] People *v.* Trinity Church, 22 N. Y. 44, 50; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 633, 788. For the course which such acts underwent in England, see Introduction to Grolier Bradford's N. Y. Laws, pp. xcix.–cii.

[2] *E.g.*, Doc. rel. Col. Hist. N. Y., III., 624.

[3] People *ex rel.* McDonald *v.* Keeler Sheriff, 32 Hun, 568; Chitty's Prerog. of the Crown, 36.

[4] *Supra*, p. 15.

[5] See note to 17 Abbott's New Cases, p. 491; Canal Comm'rs *v.* People, 5 Wend. 428, 445; Canal Appraisers *v.* People, 17 Wend. 571, 617; Bogardus *v.* Trinity Church, 4 Pai. 178; Humbert *v.* Trinity Church, 24 Wend. 624, 626; Overbagh *v.* Patrie, 8 Barb. 41; Levy *v.* Levy, 33 N. Y. 97, 107; Dunham *v.* Williams, 37 N. Y. 251.

[6] 1 Bla. Com. 108; Morgan *v.* King, 30 Barb. 9.

did not pretend that the English common law was at once in force in countries discovered and settled by English subjects, but the law of nature was said to prevail there until the Crown erected a formal government,[1] when it prescribed the common law of England as the test of the validity of colonial law. Thus the common law has always been established in the English colonial possessions where it prevails, only in some direct legislative mode,[2] such as the limitations contained in the patents and commissions from the English Crown under the great seal of England.

Blackstone's theory of such introduction was worked out on the assumption that it corresponded with the presence or the absence of a *lex loci* of English original.[3] His own appreciation of the application of his theory is shown by his statement, that the American plantations were acquired by England through conquest from the Indians;[4] a statement solemnly negatived, without adverting to the fallacy, by the Supreme Court of the United States.[5] A comprehensive examination of the executive documents and institutions of the English colonies, however, demonstrates that the English common law was imposed on all the English-speaking colonies by express limitations of the delegated authority to govern the subjects of the Crown. These limitations contained a definitive provision to the effect that such common law must be the exemplar, in so far as it was suited to the new conditions of society;[6] thus conferring on the colonial judiciary the power of rejecting the portions of the common law having no relation to the new social conditions. Even this reservation Blackstone imports into his theory, but without any mention that it was due to the prerogative action of the Crown itself.[7]

[1] Dutton *v.* Howell, Shower's Parliamentary Cases, 24, 31; Daws *v.* Pindar, 1 Freem. 175; 2 Mod. 45; 3 Keb. 26.

[2] Stokes' Constitution of British Colonies, 31, foot-note.

[3] Freeman *v.* Fairlie, 1 Moo. Ind. App. 324.

[4] 1 Bla. Com. 108.

[5] Johnson *v.* McIntosh, 8 Wheat. 543, 583; Town of Southampton *v.* Mecox Bay Oyster Co., 116 N. Y. 1, 7.

[6] All the patents, commissions, and instructions issued by the Crown contained this limitation. See Appendix No. I., *infra*.

[7] The confusion on this subject is very well shown by the arguments of

It has been already stated that the socage tenure was introduced by force of the Duke of York's patent of 1664, and that such tenure necessarily included the rules of law relative to the socage tenure.[1] The law concerning remedies and procedure came in gradually with the establishment of courts of judicature possessing jurisdictions known to the tribunals of England. The great ultimate rule that, the common law of England, in so far as it was suited to the conditions of the new country, was to be the exemplar of all colonial law, was a limitation contained in the Duke of York's own patent.[2] This limitation, often repeated in the subordinate commissions to the colonial officials, necessarily set in force in New York the law of England, in so far as it was suited to the new conditions;[3] and therefore the decision of the question—"Whether New York became a Crown possession by means of discovery and occupation, or through conquest and cession?"—seems of minor importance,[4] notwithstanding its grave consideration in several cases of the first magnitude.[5]

counsel in Journeymen Cordwainers' Case, Yates' Select Cases, 111, and in the Canal Cases, 5 Wend. 423; 17 *ibid.* 571.

[1] *Supra*, p. 13. Martin *v.* Waddell, 16 Peters, 367; Jackson *ex dem.* Smith *v.* Hammond, 2 Caines Cases, 337.

[2] Appendix No. I., *infra*.

[3] Canal Comm'rs *v.* People, 17 Wend. 571, 587; Journeymen Cordwainers' Case, Yates' Select Cases, 111.

[4] Canal Comm'rs *v.* People, 5 Wend. 423, 446; 17 Wend. 571, 584, 587; cf. Martin *v.* Waddell, 16 Peters, 367.

[5] Jackson *ex dem.* Woodruff *v.* Gilchrist, 15 Johns. 89; Bogardus *v.* Trinity Church, 4 Pai. Ch. 178; Humbert *v.* Trinity Church, 24 Wend. 587; Dunham *v.* Williams, 37 N. Y. 251; Levy *v.* Levy, 33 N. Y. 97, 107; and see note to 17 Abbott's New Cases, 478; cf. Mortimer *v.* N. Y. El. R. R. Co. 6 N. Y. Supplement, 898; 57 N. Y. Superior, 509; Hine *v.* N. Y. El. R. R. Co., 7 N. Y. Supp. 464.

CHAPTER II.

THE SOCAGE TENURE IN NEW YORK.

THE law of real property in the province of New York is not to be understood without reference to the contemporary law of England. In the year 1664, when the patent to the Duke of York expressly introduced here the ancient socage or non-military tenure of England,[1] the Statute 12 Car., II., c. 24, had but recently abolished feudal tenures in England.[2] The feudal system survived this statute only in theory and because it had been the basis of the law relating to land. Feudalism has been well defined as a social organization, based on the ownership of land and the personal relations created by the ownership of land; a state of things in which public relations were dependent on private relations, and where political rights depended on landed rights; the land itself being concentrated in the hands of a few.

The essence of English feudalism is found in the fact that all land not in the hands of the Crown itself was held of the Crown by persons in subordination to the Crown. William the Conqueror did not introduce the feudal system into England,[3] but he certainly brought in that side of it which strengthened the Crown, and he caused all freeholders to take an oath of allegiance directly to himself. Thus the English feudal system had little tendency to create an order of independent vassals who rivalled the king in power and in privilege. The distinguishing feature of English feudalism may, therefore, be said to be this: that all the land out-

[1] Appendix No. I. this volume.

[2] People *v.* Van Rensselaer, 9 N. Y. at p. 338; Van Rensselaer *v.* Smith, 27 Barb. at p. 149; *et infra*, p. 27.

[3] It is unnecessary to cite authorities, for the recent scientific investigators are all now in harmony on this proposition. See Essays on Anglo-Saxon Law: "The Anglo-Saxon Land Law," pp. 116–19. Cf. Mr. Butler's note, Co. on Litt., 191*a*.

side of the king's demesne was held mediately or immediately of the Crown, on tenures of a military or feudal character. The king thus became the sole alodial owner, the universal successor of the earlier individual proprietorship; the tenant had only an estate in the land. Under William the Conqueror, the theory that all land was held by a grant from the Crown became a fact;[1] under his immediate successors the military tenures assumed a systematic shape.

Thereafter the English law of feuds developed on lines of its own, and was little influenced by the doctrines of the foreign feudists.[2] An unlimited freedom of alienating socage lands was soon attained by socage tenants.[3] The intricate practice of alienating lands through subinfeudation was destroyed by the Statute "*Quia Emptores*" (18 Edward I., c. 1). When land was again sought to be rendered inalienable by means of the common law doctrine of conditional fees, and later on by the Statute *De Donis Conditionalibus*, which founded the species of inalienable estates called "estates tail,"[4] the doctrines of discontinuance and warranty frustrated the tendency. In the course of time a judicial fine was made a bar to the claims of issue in tail, and a common recovery to the claims of both the issue and those in remainder and reversion.[5] These were peculiarities of the law of England, and had no relation to the continental system of feuds.

The Statute of Uses (27 Hen. VIII., c. 10) changed the entire mode of conveying real property in England, and materially modified the antecedent law of feudal tenures, which was predicated of one great conception: that there

[1] Wright's Tenures, 58, 137; Madox's "Baronia Anglica," 25; People *v.* The Rector, etc., Trinity Church, 22 N. Y. 44, 46.

[2] Neither Littleton nor Coke mentions, or even alludes to, the doctrines of the feudists; although the learned men who have illustrated their works find many analogies and sources of English land law in the doctrines relating to fiefs. See Tomlin's Preface to his "Lyttleton." Cf. Finlayson's note, 1 Reeves' Hist. Eng. Law, 259.

[3] Digby's Hist. Real Prop., 199; but compare Bigelow's Int'd. to "Placita Anglo-Normanica," p. xliv.

[4] The word "tail" is derived from the French verb meaning, to cut. Cf. Malory's "Morte d'Arthur," II., 81, "La-cote-male-taillé."

[5] Mr. Butler's Preface to Coke on Littleton, *passim*; 32 Hen. VIII., c. 28 and c. 36.

should always be a tenant or a succession of tenants capable of rendering to the lord of the fee those services which were due from the legal occupant or tenant of the land. Before the Statute of Uses freehold estates in land could not be granted to vest on a future day or on a future event, for such a grant might defeat the concept denoted. The Statute of Wills (32 Hen. VIII., c. 1, and 34 and 35 Hen. VIII., c. 5), while carefully preserving the rights of feudal superiors, rendered socage lands finally devisable.[1] Thus step by step the tenants of the land were being converted into the actual owners of the soil, and the theory of a feudal tenancy was disappearing.

The subversion of the feudal law was very gradual. In the reign of James I. a project was brought forward for the purpose of relieving tenants of lands in England from the familiar burdens then incident to tenure. After the abeyance of the Crown, the Long Parliament, in the year 1645, consummated this reform, which subsequent to the restoration of the monarchy was confirmed by the Statute 12 Car. II., c. 24 (A.D. 1660), turning the military or feudal tenures into tenures in free and common socage,[2] the best of the ancient English tenures.[3] This statute discharged the socage tenure also from all its feudal incidents, excepting those known as fealty, rent, relief, and escheats.[4] Thereafter, where no rent was payable, except a trifling quit-rent, and no value attached to the service, there was little motive for the retention of the ceremony of fealty. The socage tenant was for all practical purposes the owner of the soil, and fealty to the Crown soon lapsed into a mere natural allegiance of the subject.[5]

When New York passed to the Duke of York to be held by the free and common socage tenure, strict feudalism then had virtually disappeared in England from this tenure.[6]

[1] *Supra*, p. 18.

[2] See Mr. Hargrave's Notes Co. on Litt., 85*b* and *ibid.*, note 3, 108*a*.

[3] The treatises are replete with descriptions of this tenure and its incidents. Co. on Litt., 85*b*, *et seq.*

[4] *Infra*, p. 32.

[5] *Infra*, p. 36.

[6] Van Rensselaer *v.* Smith, 27 Barb. at p. 149; People *v.* Van Rensselaer, 9 N. Y. at p. 338.

But the Statute 12 Car. II., c. 24,[1] had not declared feudalism abolished; it had simply deprived the system of life, leaving its skeleton for juridical purposes. There was yet in legal contemplation no such thing as an absolute ownership of land. Every landholder in New York deriving an estate from the Duke of York was only a tenant; the freeholder was then literally the tenant of an estate worthy of a freeman, which could not be an estate for less than life. A fee simple, descendible to a man's heirs, meant still the *feodum simplex* of Littleton,[2] but it did not mean the "feud" of the Conquest. The latter was a vanishing conception.

Whether or not we disregard the Dutch claims to New Netherland, and their subsequent cessions of it to the English Crown, it is universally true that in America the King of England, under his common law prerogative as the universal occupant of derelict lands,[3] became the source of title to vacant lands in all the thirteen colonies and the lord paramount here, as in England.[4] But the nature of the royal title and of the grant to the Duke of York and the subsequent devolution of the latter's private rights under it have been already considered.[5]

The legal estate of the immediate grantee of King Charles II. may, however, be briefly reviewed, premising that its nature is very much simplified by the fact that no other tenure is to be considered besides the common law tenure in free and common socage, as it stood in England prior to the year 1664. While the grant from King Charles II. to the Duke of York is largely patterned on the ancient palatine jurisdictions,[6] the Statute 12 Car. II., c. 24, which acted

[1] *Vid.* note 3, Co. on Litt. 93*b*, for principal changes made by this statute, which was very inartificially drawn; Challis, 21; Co. on Litt. 108*a*, notes; Madox's "Baronia Anglica," 238, 239.

[2] Co. on Litt. 1*a*.

[3] *Supra*, p. 19; Mitchel *v.* U. S., 9 Peters, 748; Martin *v.* Waddell, 16 Peters at p. 426; People *v.* The Rector, etc., of Trinity Church, 22 N. Y. 44, 46.

[4] Challis' Law of Real Prop. 4; Jackson *ex dem.* *v.* Ingraham, 4 Johns. 163, 182; People *v.* Clarke, 10 Barb. 120, p. 141.

[5] *Supra*, pp. 10, 19.

[6] 1 Bla. Com. 109; Stubbs' Const. Hist. of Eng., I., 270; Madox's "Baronia Anglica," 150; *supra*, p. 11.

on the king himself, gave him choice of this tenure only.[1] His grantees in America could consequently create such estates in land as socage tenants in England could do after the statute in question; unless the king licensed them to do otherwise; for it is said that the king himself was not for some purposes within the Statute of *Quia Emptores*.[2] But this exception will be referred to when the manors of New York are considered.[3] During the existence of the proprietary government, or before the accession of James II., the Duke of York, being a subject, was within the Statute of *Quia Emptores*.[4] His grantees, therefore, held of the Crown.[5] This was the result of the Statute of *Quia Emptores*, which after great fluctuation of opinion has now, in an adjudication of unusual weight and learning, been decided to have been operative in New York after the year 1664.[6] Consequently, as it has been said, the Duke of York himself could not have granted land in this province to be held in fee farm.[7]

This naturally brings us to the consideration of the manors created under the proprietary government of the Duke of York. There was certainly one, that of Fordham, erected under the lord proprietor in the year 1671. The erection of a manor with its court baron ordinarily imports a tenure by suit and services of the lord of the manor;[8] hence the erection of a manor is *primâ facie* prohibited by the Statute of *Quia Emptores*. It was a grave question, therefore, whether the Duke of York's own patent authorized him to grant the right to have a manor in New York,

[1] Challis, 22; Co. on Litt., 93*b*, note 3.

[2] People *v.* Van Rensselaer, 9 N. Y. at p. 334; De Lancey *v.* Piepgras, 138 N. Y. at p. 39; *sed vid.* Verschoyle *v.* Perkins, 13 Irish Eq. 72, 78.

[3] *Infra.*

[4] Sir Edward Northey in Doc. rel. Col. Hist. N. Y., V., 370; Penn *v.* Lord Baltimore, 1 Ves. Sr. 444.

[5] Chalmers' Col. Opin., 142, 143, 149; Van Rensselaer *v.* Hayes, 19 N. Y. 68.

[6] Van Rensselaer *v.* Hayes, 19 N. Y. 68, overruling De Peyster *v.* Michael, 6 N. Y. 467, and Van Rensselaer *v.* Smith, 27 Barb. 104 on this point.

[7] Doc. rel. Col. Hist. N. Y., V., 370; Chalmers' Col. Opin., 144, 149.

[8] Comyn's Digest "Copyhold," Q. 1; 2 Rol. 120; Delacherois *v.* Delacherois, 11 Ho. L. Cas. at p. 79; Glover *v.* Lane, 3 T. R. 445; Verschoyle *v.* Perkins, 13 Irish Eq. 72, 73.

at least, without express license from the Crown. An examination of the Fordham manor grant—passed under the lord proprietor—will, however, disclose that it mentions an existing Dutch "dorp," or village. As elsewhere shown, the theory of feuds was extensively applied to the towns of New Netherland.[1] The existing Dutch "dorp" may, therefore, have been made in this instance the foundation of a grant, and only conformed to the socage tenure of the duke's patent. The "colonie" of the Van Rensselaers was certainly a sub-fief created by the former Dutch Government, and protected by the articles of surrender without the necessity of any grant by way of confirmation. However, these manor grants were confirmed in 1691 by an act of the Assembly.[2]

The later manor grants being made out of Crown lands, after the Duke of York's accession to the throne (February 6th, 1685), stand on quite a different legal footing. The private estate of the proprietor had then merged in his Crown.[3] The right of the Crown to create manors in Crown lands, not in tenure prior to 18 Edward I., has at last been definitively intimated, if not held in New York.[4] The prerogative of creating manors was frequently exercised by the Crown governors subsequent to 1685,[5] and the manors thus granted were recognized as lawfully existing by the Assembly of the province. They were thus validated to some extent;[6] but these modern manors, erected after 1664, were freehold manors, not feudal manors, and the seigniories

[1] Int'd. to Grolier Bradford's N. Y. Laws of 1694, p. xxx. and note 4, p. cvii.

[2] Bradford's N. Y. Laws (edition of 1694), p. 6; People *v.* Van Rensselaer, 9 N. Y. 291, 346; People *v.* Livingston, 8 Barb. 291; Robins *v.* Ackerly, 91 N. Y. 98, 104; Lowndes *v.* Huntington, 153 U. S. 1, 26.

[3] *Supra*, p. 19.

[4] People *v.* Van Rensselaer, 9 N. Y. 291, 330; Van Rensselaer *v.* Hayes, 19 N. Y. 68; De Lancey *v.* Piepgras, 138 N. Y. 26, 39.

[5] People *v.* Livingston, 8 Barb. 253; United States *v.* Arredondo, 6 Peters, 727; Doc. rel. Col. Hist. N. Y., V., 650.

[6] Delacherois *v.* Delacherois, 11 H. L. C. 62; Bradford's N. Y. Laws (edit. of 1694), p. 6. It is a question whether Rensselaerswyck and the Manor of Livingston were not by virtue of several acts of the Provincial Assembly made political corporations for some purposes; and see De Lancey *v.* Piepgras, 138 N. Y. at p. 37.

were fully within the Statute 12 Car. II., c. 24; though the lord of the manor might, as any other freeholder, make a grant in fee simple reserving rent forever, which was valid as a rent charge.[1] The freeholder under the lord of the manor could not create a further tenure of himself, unless the lord of the manor and the king both consented.[2] After a grant in fee simple of the demesne lands of a manor (at least without reserving suit and service), the lord of the manor could not claim that they were part of the manor, for they were clearly severed, although the rents and dues remained.[3] In this way the grantee of the lands was often enfranchised or rendered free of the suit and custom of the manor. Of the origin, constitution, and history of English manors nothing need be said; the literature of the subject is too well known.[4]

A further consideration of the manors of New York is not amiss, if we have regard to the fact that less than a century ago the best part of the agricultural land of New York was embraced within the manor grants,[5] and that the decisions of the courts of New York bearing on the contractual rights of the tenants of the manor proprietors fill many pages of our law reports. The erection of these manors, in so far as it had any political design, was, no doubt, intended to form a ready-made government of first instance in then inaccessible districts, remote from the

[1] Van Rensselaer *v.* Snyder, 13 N. Y. 299; Van Rensselaer *v.* Ball, 19 N. Y. 100; Van Rensselaer *v.* Read, 26 N. Y. 558; Van Rensselaer *v.* Slingerland, 26 N. Y. 580. Cf. note by Mr. Hargrave, Co. Litt. 144*a*; and see Verschoyle *v.* Perkins, 13 Irish Eq. at p. 78.

[2] People *v.* Van Rensselaer, 9 N. Y. at pp. 336, 338; cf., though, Delacherois *v.* Delacherois, 11 Ho. L. Cases at p. 84.

[3] Delacherois *v.* Delacherois, 11 Ho. L. Cas. 62. Springstein *v.* Schermerhorn, 12 Johns. 357, shows the disappearance of tenure in a New York manor.

[4] See the leading historical authorities discussed in Andrews' "The Old English Manor," Johns Hopkins University Press, 1892. The English law books, especially the Abridgments, Madox's "Baronia Anglica," etc., are full of the later law of English manors. The Irish manors created by the English kings are very illustrative of the manors subsequently created in the English transatlantic colonies. For a description of the New York manors, except Rensselaerswyck, see Mr. de Lancey's "Origin and Hist. of Manors in the Province of New York."

[5] See Sauthier's chorographical map of 1779, Doc. Hist. N. Y., I.

central authority.[1] These manors, erected after the Statute 12 Car. II., c. 24, abolishing the feudal system, were necessarily of a very different type from the manors known to English law, for no manors had been erected in England presumably after the time of King Edward I.[2] Here there was no such thing as copyhold tenure; no room for prescription within the manors. The manors of New York can only be explained as "seisin of a defined district with the power of subinfeudation therein, and the existence of freeholders holding of the manor, and the right to a court baron, in which the feudatories were judges."[3] The New York manors must have differed in their incidents even from those earlier Irish manors erected by King Charles I., and by his predecessor, King James I., before the reform of tenures.[4] The grants of the manors in New York conferred on the grantee a seigniory only in name, but one devisable and descendible. They were, therefore, franchises or incorporeal hereditaments of a very empty nature.

The Statute 12 Car. II., c. 24, had taken away necessarily all the feudal relations between the lord of the manor and the tenant, excepting fealty,[5] relief,[6] and escheats.[7] These were the only feudal survivals which could have been incident to these modern manorial tenures. Rent of lands within such manors must have depended wholly on contract or reservation.[8] It could not have depended there on tenure or on prescription, for the manors had no tenants at first. In other words, rent sounded in contract and not in render. Therefore, in the manors of New York, especially where estates in fee simple were granted by the proprietor, the seigniories were treated as quite subordinate to rights

[1] See this subject more fully discussed in Hist. Int'd. to Grolier Bradford's N. Y. Laws of 1694, xxxiv., xcv.

[2] 2 Bla. Com. 92.

[3] Delacherois *v.* Delacherois, 11 Ho. L. Cas. at p. 83.

[4] Verschoyle *v.* Perkins, 13 Irish Eq. 72.

[5] Co. on Litt., 98*b*, note 3; 2 Bla. Com. 86, 176; Jackson *v.* Schutz, 18 Johns. at p. 180; Tomlin's Lyttleton, 124.

[6] Co. on Litt., note 2, 98*a*; 2 Bla. Com. 87; Tomlin's Lyttleton, 106; De Peyster *v.* Michael, 6 N. Y. 467, 502.

[7] Cf. Duke's Laws of 1664, title "Lands;" De Peyster *v.* Michael, 6 N. Y. 467, 502; Atty. Gen'l of Ontario *v.* Mercer, 8 L. R., Appeal Cases, 767.

[8] *E.g.*, Springstein *v.* Schermerhorn, 12 Johns. 357.

acquired by contract. Thus there must have been soon visible, either from inartificial modes of conveyancing usually employed in the manors, or else from a desire to enfranchise the lands, a constant decadence of those seigniorial rights ordinarily conferred by the grants of manors. That this theory is correct seems apparent from a total absence of cases in New York treating of the seigniorial rights, such as enforcement of judgments in the court baron, relief, and escheats of the lords of the manor.[1] Indeed, all the New York manor cases seem to depend wholly on rights which contract, not tenure engendered;[2] just as if, in the minds of the legal draftsmen, the seigniories in New York were to be regarded as "reputed manors," and not "legal manors." In no reported case has any one of the New York seigniories ever been expressly adjudicated to be legal; the cases have gone off on other points.[3]

At the present day the seigniories themselves have become mere legal traditions, and their original legality, or "constitutionality" to use a more modern expression, will probably never be adjudicated, for the lands have been rendered non-manorial and the seigniories have lapsed, although originally a large number of manor grants were made by the Crown governors.[4] In no instance did the sovereign himself grant the right to have a manor in New York. The courts have, however, intimated that a grant of a right to have a manor in connection with certain territory did not import any grant of sovereignty in New York, or necessarily include by implication land under water not distinctly expressed in the grant or included in other grants to private persons.[5]

It has been said that the seigniories in New York were never adjudicated legal. While it would appear at first glance that the legal status of a manor in New York had

[1] Cf. Att'y Gen'l of Ontario *v.* Mercer, 8 L. R., Appeal Cases, 767.

[2] *E.g.*, Springstein *v.* Schermerhorn, 12 Johns. 357.

[3] People *v.* Van Rensselaer, 9 N. Y. 291; Van Rensselaer *v.* Hayes, 19 N. Y. 68; People *v.* Livingston, 8 Barb. 253; De Lancey *v.* Piepgras, 138 N. Y. 26; Van Rensselaer *v.* Smith, 27 Barb. 104.

[4] See a list of them, 9 N. Y. p. 306; de Lancey's "Origin and Hist. of N. Y. Manors," *passim*.

[5] De Lancey *v.* Piepgras, 138 N. Y. at pp. 36, 37, and 38.

been conclusively adjudged, yet the cases on examination are not perhaps final. The case of the People *v.* Van Rensselaer[1] was an action of ejectment, involving the validity of the Crown grant, which incidentally confirmed the seigniorial rights of the ancient manor proprietor. The grant of the land was held valid and sufficient to vest a title, even if the grant of a right to have a manor was illegal or *ultra vires* of the Crown. Judge Denio, however, expressed an opinion of very great weight in favor of the absolute validity of the seigniory, and he affirmed the power of the Crown after the Statute of *Quia Emptores* to license his immediate tenant to create a tenure of the latter, provided the land was not in tenure prior to 18 Edward I. This opinion he subsequently reiterated in the case of Van Rensselaer *v.* Hayes;[2] but again the validity or constitutionality of the seigniory of Rensselaer was not necessarily involved in the judgment, as the case was simply one to enforce a covenant running with the land in the nature of a rent charge. The opinions of Judge Denio have, however, been deemed quite conclusive of all the points discussed by him, and they are certainly of the highest order. They even anticipate an intimation[3] that the dispensing power of the king could not be exercised after the Bill of Rights (and that, therefore, the Statute of *Quia Emptores* became generally operative when the dispensing power became illegal), by a careful distinction between the legal and the illegal prerogative of dispensing with statutes.[4] But the opinions speak for themselves and require no laudation.

The vaster body of the lands of the province lay without the manors, but much of this non-manorial land was then vacant, wild, and forested. Under the Duke of York the grants and confirmations show that the tenure of this land was intended to be of the lord proprietor; but as there was no *non obstante* clause in the duke's patent from King

[1] 9 N. Y. 291, to the contrary of De Peyster *v.* Michael, 6 N. Y. 467, and Van Rensselaer *v.* Smith, 27 Barb. 104.

[2] 19 N. Y. 68.

[3] In Verschoyle *v.* Perkins, 13 Irish Eq. at p. 78.

[4] People *v.* Van Rensselaer, 9 N. Y. at p. 335.

Charles II.,[1] the Statute of *Quia Emptores* was necessarily in force here as part of the socage tenure limited by the patent, and the grantees therefore held of the Crown direct.[2] As the lord proprietor soon succeeded to the Crown, and the quit-rents were annexed to it, while the ungranted lands passed to and with the Crown, this distinction became unimportant.[3] After 1685, when the province devolved on the Crown, the grants of lands were (with two exceptions under the great seal of England) made by the Crown governors under the great seal of the province,[4] and such grants are now adjudged to be plenary evidence of the royal grant itself, as well as of the governors' authority.[5] The grants usually reserved certain quit-rents or rents in lieu of all other rents,[6] but their *reddenda* show that there was little uniformity in the amount of the quit-rents until Queen Anne's time. At first the *reddendum* was "paying the usual rents of new plantations," afterward "paying such duties as shall be constituted and ordained." But Queen Anne directed the quit-rents to be made not less than 2*s.* 6*d.* per one hundred acres.[7] Thenceforth the amount did not vary until the War of Independence, when the quit-rents passed to the State government and were ultimately commuted.[8]

[1] See Verschoyle *v.* Perkins, 13 Irish Eq. 72, for example of a *non obstante* clause.

[2] Sir Edward Northey in Doc. rel. Col. Hist. N. Y., V., 870; Chalmers' Colo. Opinions, 142, 144, 149; Van Rensselaer *v.* Hayes, 19 N. Y. 68.

[3] *Supra*, p. 19.

[4] People *v.* Livingston, 8 Barb. at p. 279; Bogardus *v.* Trinity Church, 4 Sandf. Ch. 734, Doc. rel. Col. Hist. N. Y., V., 650.

[5] Crill *v.* City of Rome, 47 How. Pr. 398; People *v.* Schermerhorn, 19 Barb. 540; United States *v.* Arredondo, 6 Peters, 691, 729; Martin *v.* Waddell, 16 Peters, 427; People *v.* Livingston, 8 Barb. 253, 280; De Lancey *v.* Piepgras, 138 N. Y. 26, 42; Brookhaven *v.* Strong, 60 N. Y. 56.

[6] De Lancey *v.* Piepgras, 138 N. Y. 39; 2 Bla. Com. 43; Hatton *v.* Waddy, 2 Jones, Ir., 548, 549. The use of this term "quit-rents" shows that the palatine origin of the province always recurred to English lawyers. "Quit-rents" were especially rents in manors. A proprietary government was a feudal seigniory. Penn *v.* Lord Baltimore, 1 Ves. Sr. 444.

[7] Report of Surveyor-General of the Province, Doc. Hist. N. Y., I., 377; Doc. rel. Col. Hist. N. Y., V., 652; *ibid.*, V., 868, 650.

[8] They undoubtedly passed by virtue of the Revolution itself and the subversion of the royal authority. A "resolve" of the Provincial Convention of

The grants by letters patent were in form exceedingly simple, being little more than the primitive deed of grant of early English institutions.[1] There was thus visible in law a return to a period when the king himself made grants of territory to his followers, although in New York the grants were to emigrants and on the presumption, although not always on the condition, that the land should be tilled by them.[2] The return to a state of things so primitive in English law made the application of the Statute of *Quia Emptores* to the manor proprietors in New York a very difficult task.[3]

The Statute 12 Car. II., c. 24, explains a socage tenure of the king himself.[4] This great statute turned lay tenures into free and common socage, and precluded the king from creating any other tenure. This being so, when the king made patents of lands *tenendum* in free and common socage and not *in capite*, the seigniorial rights of the king were not essentially different from those of other manor or palatine proprietors, where the land was held by the reformed socage tenure.[5] The royal prerogatives, it must be remembered, were quite distinct from the seigniorial rights of the Crown over tenants of modern socage

1777, however, vested the quit-rents in the State government (Journ. Prov. Conv., I., 554). In 1779 the State Legislature passed an act to the same effect (sec. 14, 1 J. & V. 44; De Peyster *v.* Michael, 6 N. Y. 503). Ultimately the quit-rents were commuted by the State and the tenant of socage lands paid a lump sum. 1 J. & V. 250; 2 R. L. 175; c. 23 Laws of 1786; 1 Webster's Laws, 607, sec. 6; c. 33 Laws of 1798; c. 222 Laws of 1819; De Lancey *v.* Piepgras, 138 N. Y. 40, 41. The Statute of Limitations began to run against quit-rents January 1st, 1820; c. 119 Laws of 1813; Kent's "City Charter," p. 172, note AAA.

[1] There is a curious Indian deed to the Duke of York in 1670 for Staten Island. It is evidently based on the assumption that the Statute of Uses, 27 Hen. VIII., c. 10, applied to the transaction, Doc. rel. Col. Hist. N. Y., xiii., 455. The king's grants were always matter of public record.

[2] Doc. rel. Col. Hist. N. Y., V., 650.

[3] Jackson *v.* Schutz, 18 Johns. 174, 180, 185; De Peyster *v.* Michael, 6 N. Y. 467; Van Rensselaer *v.* Hayes, 19 N. Y. 68.

[4] See *supra*, note, p. 12; *et infra*, pp. 37, 38.

[5] Chalmers' "Colonial Opinions," 142. The king had some advantages; for example, the Crown need make no demand for rent. Boroughe's Case, 4 Rep. 72. There were other like distinctions founded on the king's dignity, but not extending his seigniorial rights beyond the rights of other seigniors in the English law. 2 Bla. Com. 260; and see Bacon's Abr. Tit. Prerogative, E. 3.

lands. Yet the king might distrain for a rent-seck, which in the case of a common person was not distrainable at common law, and out of all other lands of the lessee.[1]

The reason that the *tenendum* of the king's patent to the Duke of York was declared to be "in free and common socage, and not *in capite*, nor by knight service, yielding and rendering," was, as we have seen, due to the great statute, 12 Car. II., c. 24: it is taken from the mandatory language of this statute. The patent furnishes, therefore, an instance of a tenure of the king, created by the king, and yet not in chief or *in capite*. Madox thought that the expression "*not in capite*" was improperly used in the statute;[2] but, as hereinafter explained, this was not a novelty, although Challis calls the statute loosely drawn. While before this statute of Charles II. there were socage[4] tenures *in capite*,[5] they were not common. The feudal incidents of a tenure *in capite* were most marked, and the design of the statute in limiting future tenures to one not *in capite* no doubt was to emphasize the abolition of the feudal incidents of a tenancy *in capite*,[6] and all feudal incidents excepting those saved in the statute. In this way future lay tenures were reduced to the level of a tenure by free and common socage *sine medio*, or when not *in capite*.

As subsequent to the Statute 12 Charles II., c. 24, no other tenure besides that in free and common socage could be created by the king, the *tenendum* clause of a deed often ceased to express the kind of tenure, as it was clearly surplusage. Prior to this statute a tenant of the king must have been a tenant *in capite*,[7] and his tenure some species

[1] Bacon's Abr. Tit. Prerogative, E. 3.

[2] This was regarded by the old lawyers as most insensible, for how could there be any other tenure of the king than one *in capite*. See Madox's "Baronia Anglica," Lib. III. ("Tenure in Capite"), for full discussion of tenure *in capite* and the effect of the Statute 12 Car. II., c. 24.

[3] Hist. of Exchequer, 432, note, and "Baronia Anglica," 236, 237.

[4] Cf. Challis, 21; Hargrave's note 116, Co. on Litt., 108*a*; Statute 35 Hen. VIII., cap. 14, sect. 3.

[5] In the Royal Manors; *vid. infra*.

[6] The Stat. 35, Hen. VIII., cap. 14, sect. 3, distinctly permitted the king to create a tenure in socage and not *in capite*; but see Madox's criticism of this tenure, "Baronia Anglica," 236, 237.

[7] Challis, 4; Wright's Tenures, 137.

of chivalry or *ut de coronâ;* but even before the statute in question there were examples of socage tenure *in capite*, or of the king.[1] Bracton says: "There are in the manor of our lord the king, knights and freeholders by military service and in free sockage."[2]

While the Duke of York was proprietor of New York, being a subject, his grantees held of the king by force of the Statute of *Quia Emptores*.[3] But there was then in the minds of some persons an idea, that after the manner employed in the counties palatine, on which the proprietary governments were modelled,[4] the tenure might, *non obstante* the statute, be of the duke himself. After the proprietor became king this idea was forgotten or ceased to be of consequence, as the Duke of York's estate merged in his Crown. The tenure was then clearly of the king. The Statute 12 Car. II., c. 24,[5] had at that time left only the following feudal incidents connected with lay tenures: fealty, relief, rents certain, and escheats.[6] Fealty and reliefs were not in New York exacted in practice.[7] Fealty[8] had now a tendency to be confused with allegiance, although they were distinct duties and legal conceptions.[9] Reliefs on socage tenure were one year's rent or render. They were not due on fee farm grants.[10] Escheats stood upon much their present footing.[11]

[1] Washburn errs on this point, I., 27—*e.g.*, Elizabeth granted lands "*tenendum de nobis in libero socagio et non in capite*," which Madox says was a contradiction in terms. Digby's Hist. Real. Prop., 361, note 4; Case of the County Palatine of Wexford, Davies (Ir.), 159; notes 3 and 5 Co. on Litt., 108*a*; cf. Jackson *v.* Schutz, 18 Johns. 186.

[2] Lib. iv., cap. xxviii., f. 209, and see Lord Coke, 2 Inst. 65, and Madox's "Baronia Anglica," "Tenure in Socagio," p. 239.

[3] Doc. rel. Col. Hist. N. Y., V., 370.

[4] *Supra*, p. 11.

[5] This statute marks the end of the feudal system, and "tenures" thereafter were of little importance, except as illustrative of legal rights and remedies. Even Madox seems to think tenures exploded by 12 Car. II., c. 24.

[6] *Supra*, p. 32.

[7] Cornell *v.* Lamb, 2 Cow. 652, 655.

[8] 2 Bla. Com., 53.

[9] Jackson *v.* Schutz, 18 Johns. p. 180; Co. Litt. 68*b*; Hale's Pleas of the Crown, I., 62, 70, and brief of counsel in Cornell *v.* Lamb, 2 Cow. 652, 654.

[10] "Olde Tenures," § 18. Cf. Co. on Litt., 85*b*, note 1.

[11] Att'y Gen'l of Ontario *v.* Mercer, 8 App. Cases, 767; Burgess *v.* Wheate, 1 Eden, 177, 190, 227.

The patents or grants of New York lands made by the Crown, although they were of a fee simple, always reserved the rents called quit-rents.[1] Quit-rents were a perpetual charge vested in the Crown and issuing out of an estate in fee.[2] They are said to have been so called because the tenant went quit of all other rents;[3] but this etymology may be disputed.[4] In New York the Crown patents contained no provision for a distress, re-entry, or forfeiture upon a failure to discharge the quit-rents.[5] But in a recent case it has been said that the mere reservation of the quit-rents by the Crown created an *estate on condition*, and that the rents were "rent service" when due to the Crown, and that their non-payment worked a forfeiture of the estate granted.[6] Counsel in this case went so far as to claim that non-payment entitled the Crown to resume immediate possession[7] without any legal proceedings whatever,[8] but the opinion of the court negatives this claim. De Lancey *v.* Piepgras distinguishes between a fee farm grant from the Crown and one between private persons after the Statute of *Quia Emptores*.[9] It validates the one and invalidates the other. The importance of this decision to the subject under consideration justifies a discussion of the points involved in it.

[1] *Supra*, p. 35.

[2] Hatton *v.* Waddy, 2 Jones (Ir.), 541, 548, 549; and see Judson *v.* Wass, 11 Johns. 525, for a fee sold subject to quit-rent.

[3] De Lancey *v.* Piepgras, 138 N. Y. 26, 39.

[4] Wood's Inst. of the Law of England, 179.

[5] In the case of an ordinary person such a reservation would have been *rent-seck;* but because of the tenure of the king fealty was due to him, and the quit-rents were rent service.

[6] De Lancey *v.* Piepgras, 138 N. Y. 26, 39.

[7] The counsel's cases cited refer to terms for years. There is a great difference between conditions annexed to estates of freehold and conditions annexed to estates for years. In the latter case upon the happening of the condition the estate *ipso facto* ceases. In the former there is no cessor of the estate without entry or claim for that purpose.

[8] See People *v.* Brown, 1 Caine, 416, and English cases cited to the contrary.

[9] It will be observed that if the seigniories of New York were constitutional, the manor proprietor could create a tenure of himself and was chief lord of the fee. Yet in Springstein *v.* Schermerhorn, 12 Johns. 357, it was held that such chief lord of the fee had no reversion on a fee farm grant. This would seem opposed to the conclusion in De Lancey *v.* Piepgras.

The term "fee farm" originally imported a feud granted to a man and his heirs generally, to be held by the socage tenure, yielding therefor to the feoffor and his heirs, successors, or legal representatives "white rent" or provisions annually or at stated periods.[1] Bracton mentions *feodi firma*,[2] and such feuds are referred to in Magna Charta.[3] They were not, however, originally classified as estates on condition, or even with conditional fees at common law.[4] The latter were only limitations in tail before the Statute *De Donis*. Indeed, most of these classifications of estates are of a date later than the Statute of *Quia Emptores*, and it is doubtful whether any of them originally included fees farm which are *sui generis*.[5] Littleton, for example, says[6] "that before the Statute *De Donis* all inheritances were fee simple, for all the gifts which be specified in that statute were fee simple conditional at the common law."[7] Littleton's subsequent classification of "estates on condition" has no relation to fiefs or to pure feuds. He wrote some four hundred years after the Conquest, and belongs to the school of jurists that flourished intermediately or between the days of the English feudists and those of the modern school. When fiefs became in law "fees" or "estates," they were subjected anew to a fuller and more scientific classification by Lord Coke, whose influence lasts till our own day.[8]

In course of time a "fee farm" thus came to be classed with estates on condition, and it designated any fee simple

[1] Such a grant or feoffment was always holden in socage, for wherever rent was payable, the estate was not strictly feudal, but rather "censual" or "reditual." Such an estate was a fee simple. See Madox's "Baronia Anglica," 260, and note to Tomlin's "Lyttleton's Tenures," p. 272; also 2 Inst. 43.

[2] Lib. 1, cap. vi., f. 86.

[3] Magna Charta, Hen. III., cap. xxvii.

[4] 2 Bla. Com., 110.

[5] See note "K," p. 272, Tomlin's "Lyttleton's Tenures."

[6] Litt. Tenures, sec. 13.

[7] Glanville makes no reference to feuds on condition or conditional fees, although Lord Coke gives him as an authority, citing Lib. 10, c. 8; a reference criticised by Mr. Beam in his edition of Glanville (note, p. 255 of that work), and see note 12 to 2 Bla. Com. 109, Wendell's edit.

[8] It seems almost an anachronism to import a later term of science into a definition of an earlier institution, and to call a fee farm an "estate on condition."

reserving a perpetual rent to a chief lord, and in this sense "fee farm" is used by Lord Coke.[1] According to Littleton, no person except the chief lord of the fee, or him who had the reversion, could, after the Statute of *Quia Emptores*, make a fee farm.[2] Mr. Hargrave thought rent service or fealty the essential of a "fee farm," and not the *quantum* of the rent, and that after the Statute of *Quia Emptores* no one but the king could make such grant, except by deed empowering the grantor to distrain. This, he said, was good as a rent charge.[3] The right of the king to make a fee farm grant in New York seems clear by all the authorities. The real question discussed in De Lancey *v.* Piepgras is, what was formerly the remedy for non-payment of the quit-rent reserved to the Crown? The practice in the province of New York indicates that there was a difficulty. De Lancey *v.* Piepgras, however, determines[4] that a fee farm was an estate on condition in the seventeenth century, and this classification finds some support in Littleton's Tenures,[5] if the section does not relate wholly to estates for years where there was a reversion in the lord. It has, nevertheless, been held that the lord had no reversion in a "fee farm."[6]

There appears to be no adjudged case in the province of New York determining that the Crown grants in fee simple reserving a quit-rent to the Crown were to be construed as creating an estate upon condition.[7] *In limine* we notice that Sir Edward Northey regarded the language of the reservation contained in these New York grants as very loose,[8] and as they contained no express condition and no clause for a distress or a re-entry, they were certainly not strin-

[1] Co. on Litt., 143*b*; but see Mr. Hargrave's note 5, 144*a*.

[2] Litt., sections 213–17.

[3] Note 5, Co. on Litt., 144*a*; and see Year Book 11 and 12 Edw. III., f. 501 (A.D. 1338). A fee farm is then a fee simple reserving rent to a chief lord of the fee. A rent charge reserves a perpetual rent to any grantor of a fee simple, and provides for distress for non-payment.

[4] Cf. 2 Bla. Com., 154–55; Co. on Litt., 201*a*.

[5] Sec. 331.

[6] *Infra*, p. 43, cases cited.

[7] Cf. "Lyttleton's Tenures," sec. 325, *et seq.*

[8] Doc. rel. Col. Hist. N. Y., V., 363.

gent. The difficulty in collecting the king's quit-rents was, therefore, very great. Sometimes bills in Chancery were filed by the attorney-general of the province for a discovery and the collection of arrearages,[1] as there seemed to be no adequate remedy at law.[2] In 1734 the aid of a court of exchequer[3] was invoked, but this practice soon fell into disuse,[4] and at a later day acts were passed by the Assembly of the province to aid the collection of the quit-rents.[5] The total amount of the quit-rents in New York prior to independence was very small, and in no case was any attempt to enforce a forfeiture for their non-payment declared legal by the Privy Council, then the supreme appellate tribunal for the province of New York.

The practice in connection with the quit-rents due to the Crown indicates that the king's remedy in this province was deemed uncertain or inadequate, except by a real action,[6] the writ of *cessavit*,[7] or by the distresses open to any other lord to whom fealty was due. The king, however, could distrain even for a rent-seck,[8] and outside of the fee as well as in it.[9] The reader will remember at this point, that by the common law lands could not be sold for debts; they could only be extended.[10] An *elegit* was first given by the Statute of Westminster 2 (13 Edw. I., c. 18).[11] So ordinarily before a forfeiture could be enforced the plaintiff

[1] People *v.* Rector, etc., Trinity Church, 22 N. Y. at p. 50; Doc. rel. Col. Hist. N. Y., V., 370, 561, 848.

[2] Doc. rel. Col. Hist. N. Y., V. 11, 357, 499, 931.

[3] Cf. sec. 7, 22 Car. II., c. 6, and Doc. rel. Col. Hist. N. Y., VI., 4; 3 Bla. Com., 44 *et seq.* The Supreme Court Justices of N. Y. had an exchequer jurisdiction by their commissions, and the Act of 1691, and the ordinances continuing the court. See note 2, Grolier Bradford's N. Y. Laws of 1694. Cf. 33 Hen. VIII., c. 39; 11 W. III., c. 2, sec. 154.

[4] Doc. rel. Col. Hist. N. Y., VII., 900.

[5] 1 Van Schaack, 45, 403; c. 53, Laws of 1775.

[6] Litt. Tenures, sec. 236; 2 Bla. Com. 257–60.

[7] The statute of Gloucester was re-enacted by Jones *v.* Varick, showing that they thought this statute in force in New York in 1777; 2 J. & V. 108. Cf. Sir Edw'd Northey, Doc. rel. Col. Hist. N. Y., V., 370.

[8] Bro. Prerog., 3 Leon, 144, 145.

[9] 2 Co. Inst., 130; Stat. of Marlbridge, *cap.* xv.

[10] The action at law for debt of rent lay only for rents reserved on terms for years, and did not extend to freehold rents. (Gilbert on Rents, 93.)

[11] Catlin *v.* Jackson, 8 Johns. 520, 547.

must show that there was no sufficient distress ;[1] and where there was no clause of re-entry reserved for failure to pay rent ejectment could not be maintained.[2] The remedies of the Crown in the colonies differed little from those of other chief lords of a fee. Such, in the eighteenth century, were some of the apparent embarrassments of a fee farm rent where there was no clause of re-entry or forfeiture expressed therein.

The decision in De Lancey *v.* Piepgras necessarily involves the examination of the law of England before the Statute of *Quia Emptores*,[3] a period of time prior to the year books which begin in the reign of Edward II.[4] Yet the only reported adjudication,[5] precisely in point, seems either to have passed unnoticed or else to have been disregarded in the discussion in De Lancey *v.* Piepgras. In the course of the adjudication referred to, the Irish Court held that a fee farm grant by a chief lord of the fee, unaffected by the Statute of *Quia Emptores*, did not create the relation of lord and tenant, and that the lord had no reversion.[6] This conclusion seems quite opposed to that of De Lancey *v.* Piepgras ; but the examination of the law of so remote a period in English history is full of difficulties. A fee farm is of great antiquity in English law,[7] yet Glanville throws little or no light on the law of a fee farm.[8] Bracton, who wrote probably just before the Statute of Marlbridge (1267), is referred to by Lord Coke for the purpose of showing that before the writ of *cessavit per biennium* was given by the Statute of Marlbridge, quit-rents could be collected only by the lord's taking the tenement into his own hands as a simple distress, until he had been satisfied for the rent.[9] It will

[1] Jackson *ex dem.* Van Rensselaer *v.* Collins, 11 Johns. 1.

[2] Jackson *ex dem.* Van Rensselaer *v.* Hogeboom, 11 Johns. 163.

[3] The king stood in little different position from that of any other chief lord of a fee, after this statute, in so far as his seigniorial rights were concerned.

[4] A period wrapt in much obscurity.

[5] Verschoyle *v.* Perkins, 13 Ir. Eq. 80, 82.

[6] And see also People *v.* Van Rensselaer, 9 N. Y. p. 76 ; Bacon's Abr. Tit. "Prerog.," E. 3 ; and Challis, 64, 65.

[7] See Magna Charta, *regno* Hen. III., c. xxviii., *feodi firma*.

[8] Glanville's is the first treatise on the English law.

[9] 2 Inst., 295 ; Bract. Lib. iv., f. 205*b*, and f. 262 ; and see Madox's "Baronia Anglica," 97, "Seizure of land for default of doing service."

be observed, therefore, that when Bracton wrote, a period at least two hundred years after the Conquest, the right of a lord to resume possession of a fief had already given way to a regular judicial procedure. To use modern language, the fee had already ceased to be purely conditional,[1] and the lords could not seize the fee or fief for rent, unless there was a want of chattels.[2] The Statute of Marlbridge (52 Hen. III., c. 22; *circ.* 1267) took away the lords' power to distrain the fee.[3] In consequence whereof it is said that the distresses of all inferior lords became purely personal,[4] and then they were aided by the Statute of Gloucester (6 Edw. I., *cap.* 4) and Westminster 2d (13 Edw. I., *cap.* 21), which gave them the writ of *cessavit per biennium.*[5]

The facts last mentioned seem to preclude the idea that just before the Statute of *Quia Emptores* a fee farm was, because of the perpetual rent reserved, "a qualified or conditional fee."[6] Before the Statute *De Donis* any feoffment or gift to A and the heirs of his body was "a conditional fee," as contradistinguished from a "fee simple," which was to heirs generally. A fee farm being fee simple could not have been a conditional fee at common law.[7] Nor was there then any material difference between the king's seigniories and those of any other of the *domini capitales.*[8] The former were within the Statute of Marlbridge, and the king could not after that statute distrain the fee for non-payment of rent.[9] He, no doubt, had the benefit of a *cessavit* in cases where there were no distresses, at least after the Statute of Gloucester,[10] and perhaps before that statute. Two hundred years after the Conquest simple fiefs were not

[1] Cf. note 84 Co. on Litt., 201*a*, and Gilbert on Rents, 93.

[2] Cf. Wright's Tenures, 194–98.

[3] It bound the king, 2 Inst. 142; Gilbert on Rents, 93, 94.

[4] Wright's Tenures, 199.

[5] Note 251, Co. on Litt., 142*a*; see 11 and 12 Edw. III. (Year Book), f. 501.

[6] De Lancey *v.* Piepgras, p. 39.

[7] Year Book, 11 and 12 Edw. III., f. 501.

[8] See Magna Charta, cap. xxxi., Year Book, 24 Edw. III., 55, pl. 40. Cf. Intro. to Bigelow's "Placita Anglo-Normanica," xxxiii.

[9] 2 Inst., 142.

[10] A *cessavit* seems to have been brought in the reign of King John, 2 Inst., 295; but see note 231, Co. on Litt., 142*a*; Gilbert on Rents, 93.

easily forfeited by the feudal lords, the great charters had already dealt with this very thing,[1] and had subjected forfeitures to the regulations of positive law. A failure to pay rent was, however, remediable in several modes.

The Court in De Lancey *v.* Piepgras states that for such non-payment "the king might by inquisition have the estate of the tenant declared at an end,[2] resume possession, and his original seisin[3] would be restored unaffected by the previous demise."[4] No authorities are cited for this proposition, which is much to be regretted; for, as already intimated, there are cases in the modern English books which do not seem to authorize this conclusion. We have to observe that in all events the term "demise," to describe a fee farm, is unfortunate, as the king's patents in question were in no sense leases or demises, but royal grants of a fee simple.[5] The early law of England knew of no estate or proprietary interest less than freehold. A term of years was an anomalous estate, which never acquired any definite place in the feudal system, and pushed itself into the rank of legal estates only by virtue of the statute (21 Hen. VIII., c. 15).[6] Even after this statute a fee farm grant was not a demise.

Let us recur to the cases not noticed in De Lancey *v.* Piepgras, but reported in the English books. Where a clause of re-entry[7] was expressly reserved in a fee farm grant, the case was quite clear, and if the re-entry was obtained in judicial proceedings, it was said to make void the grant *ab initio*,[8] but

[1] Reeves' Hist. Eng. Law, I., 259, note 1.

[2] This power to have the fief declared at an end refers to the earliest feudal law (Gilbert on Rents, 92); not to the eighteenth century.

[3] 138 N. Y. 39. The word "seisin" must be here used as meaning "possession," and not in its feudal significance, as the completion of the investiture of the tenant, admitting him into possession of the feud. See, *e.g.*, Jackson *v.* Demont, 9 Johns. 55, 58.

[4] It is said that the words "yielding and paying" in a demise do not create a condition. Tallman *v.* Coffin, 4 N. Y. 134, 138.

[5] See "Precedents in Conveyancing" (3d edit.) Title "Leases" as to apt words to constitute a demise, *et infra*, c. VI., "Leaseholds."

[6] Challis, 6, 46, 47.

[7] Cf. Littleton, sections 325, 330; Sheppard's "Touchstone," 122.

[8] Flower *v.* Hartopp, 6 Beav. 476.

it was distinctly said also in conformity to other decisions,[1] that the assignment of the rent was not a grant of the reversion. By several acts of Parliament,[2] not extended to New York, purchasers in England of fee farm rents from the Crown were given the same remedies (with an exception in the exchequer) enjoyed by the Crown. In Attorney-General *v.* Mayor of Coventry,[3] it was conceded apparently by counsel that the king could distrain for quit-rents only while the lands were in the hands of the defaulting tenant, but not after he had aliened. Nor could the king then recover by *elegit.* It was said that the king's right was therefore precarious. Certainly the proceedings in the province of New York corroborate this statement, and make it doubtful whether the king could always (as stated in De Lancey *v.* Piepgras) by inquisition have the estate of the tenant declared at an end.[4] After a lapse of time and non-claim the quit-rents were presumed to be paid.[5]

It is a rule of law that the king's grants are to be construed for the king, but this doctrine is subject to limitations. They must be open to two intents before that intent which makes most for the king is taken;[6] and when the grant was for a valuable consideration they must be construed most favorably for the patentee.[7]

While a grant in fee reserving a perpetual rent has been held valid in New York as a rent charge,[8] a reservation to the grantor and his heirs of a "quarter sale" or "sixth sale," or other specific sum upon a sale or demise of the property, whenever such sale or demise happened, has been declared a void reservation and repugnant to a grant in fee simple, and the estate stood divested of such condi-

[1] *Supra*, p. 43.

[2] 22 Car. II., c. 6; 22 and 23 Car. II., c. 24.

[3] 2 Vern. 713.

[4] Note 231, Co. on Litt., 142*a*, and note 84, 201*a*.

[5] Simpson *v.* Gutteridge, 1 Maddock, 609, 614, 615; Kent's City Charter, note AAA, p. 172; c. 53, Laws of 1775.

[6] See the authorities cited and this whole subject discussed in Forsythe's "Cases and Opinions," pp. 175, 176.

[7] Sir John Moline's Case, 10 Rep. 65; Langdon *v.* Mayor, etc., City of N. Y., 93 N. Y. 129, 147.

[8] Van Rensselaer *v.* Hayes, 27 Barb. 104; affirmed 19 N. Y. 68; Van Rensselaer *v.* Ball, 19 N. Y. 100.

tion.[1] This principle until 1846 rested on the common law of the province of New York, which was by the Constitution of 1777 made the fundamental law of the State.[2]

In several instances the people of the State, as successors to the subverted sovereignty and prerogatives of the Crown,[3] have instituted actions designed to vacate letters patent, granted by the king, claiming that such actions were not barred by lapse of time, according to the maxim *nullum tempus occurrit regi.*[4] A proceeding by "action" is now a substitute in New York for *scire facias*, which was the king's remedy; but these attempts of the State have either been held to be barred, or have not been encouraged by the courts. They have uniformly resulted adversely to the people, or in favor of those claiming under the Crown grants, the English statutes of limitation or their revisions, being held a bar to the actions and always a part of the law of New York.[5] The English statutes, referred to in the New York cases, 21 James I., c. 2, and 9 Geo. III., c. 16, limited the king's time to proceed against his patents, and these limitations were extended to his successor, the people of the State. The substance of the English statutes was incorporated in the several revisions by Messrs. Jones & Varick[6] and Kent & Radcliff,[7] the words "the people of

[1] Overbagh *v.* Patrie, 8 Barb. 28; Const. 1846, Art. I., Sec. 15.

[2] For a full discussion of the general subject, "Common Law of New York," adopted by the Constitution of 1777, as the fundamental law of the State, see "Journeymen Cordwainer's Case," Yates' Select Cases, 111, and as to English statutes forming part of the common law of New York, Bogardus *v.* Trinity Church, 4 Pai. Ch. 178, 198. The term "common law" is used in many senses by different writers: 1. As denoting the jurisprudence of England in contradistinction to the Roman or civil law. 2. As indicating the law of custom or usage, *jus moribus constitutum.* 3. As defining the more ancient laws of England. 4. As equivalent to the non-statute, or "judge-made," law, *jus prudentibus constitutum.* The Hon. Charles P. Daly has just published a new thesis illustrating this subject, entitled "The Common Law," New York, 1894.

[3] People *v.* The Rector, etc., Trinity Church, 22 N. Y. 44, 46.

[4] 3 Bla. Com., 307.

[5] People *v.* Van Rensselaer, 9 N. Y. 291; People *v.* Clarke, 9 N. Y. 349; s.c. below 10 Barb. 120; 11 Barb. 337; People *v.* Livingston, 8 Barb. 253; Bogardus *v.* Trinity Church, 4 Pai. 178, 198.

[6] 2 J. & V., 260.

[7] 1 K. & R., 562.

the State" being substituted for the words "the king, his heirs or successors."[1] At the present day these revisions remain the historical basis of the law limiting actions by the people in their sovereign capacity.[2] Under the Crown government the New York Assembly had no authority to encroach on the king's prerogative, and could prescribe no limitation to his power to annul his patents, except with his consent.[3] It was otherwise with regard to statutes concerning the suits between private persons, and therefore statutory limitations of such rights were not unknown from the earliest times.[4] The acts vacating the extravagant grants of some of the Crown governors were passed by direction of the Lord Justices of England representing the Crown.[5] Even these acts, though ultimately approved by the Privy Council in England, were by many deemed unconstitutional and contrary to the common law.[6]

In 1699 the Assembly passed an act restraining leases by the governor of the king's farm for a longer term than his own official residence.[7] This act was repealed by the Assembly on November 27th, 1702,[8] and was not in force in the province from that time to June 26th, 1708, when the Queen disapproved the repealing act and confirmed the act of 1699.[9]

The royal patents for lands never included by implication the royal rights to mines. By the common law the king had here, as elsewhere in his dominions, mines of gold and silver as part of his prerogative of coining,[10] and under this

[1] People v. Clarke, 10 Barb. 120, 144; 9 N. Y. 349, 360.

[2] Bogardus v. Trinity Church, 4 Pai. 178; 15 Wend. 111; 4 Sand. Ch. 633; People v. Rector, etc., Trinity Church, 22 N. Y. 44, 57; Code of Civ. Pro., section 362.

[3] Doc. rel. Col. Hist. N. Y., V., 117.

[4] An "act of settlement," passed November 2d, 1683; "an act for quieting of men's estates," etc., passed October 24th, 1684.

[5] Act of May 12th, 1699, 1 Van Schaack, 81; Bogardus v. Trinity Church, 4 Sandf. Ch. at p. 729. Doc. rel. Hist. N. Y., IV., 587, 785; Doc. Hist. N. Y., I., 377, 380.

[6] Doc. rel. Col. Hist. N. Y., V., 23.

[7] 1 Van Schaack, 81.

[8] *Ibid.*, 51.

[9] Bogardus v. Trinity Church, 4 Sandf. Ch. at p. 787.

[10] Chitty's Prerog. of the Crown, 145; Case of the Mines, Plowden, 336, 339; 2 Bla. Com., 43, note.

description were included mines of lead, tin, and copper, containing either of the precious metals. The royal rights were somewhat modified by statute,[1] which extended to New York.[2] These prerogatives passed, at the subversion of the monarchy, to the people of New York, who have never parted with them, although regulating them by proper conventions.[3]

The rights and relations of the Crown to the tide-waters and tidal creeks, embraced in the Duke of York's patents, are sufficiently distinct from the subject of tenure as to require a separate treatment in a more methodical and extended manner than is permitted here. The reader is, therefore, referred to the existing treatises on this subject, and particularly to their ample citations of authority.[4]

[1] 1 W. & M., 1 c. 20; 5 and 6 W. & M., c. 6.

[2] 1 J. & V., 335; 2 J. & V., 402, 403, 445, 462, 468; 1 R. L., 124; 1 R. S. 281.

[3] 1 R. S., 281.

[4] Gould's Treatise on the Law of Waters, Chicago, 1883; Pirsson's Dutch Grants, Harlem Patents and Tidal Creeks, New York, 1889; *supra*, p. 12.

CHAPTER III.

LOCAL INCIDENTS.

AN outline of the condition of the socage tenure of England in the year 1664, when it became the tenure of all the lands of New York, has been attempted in the preceding chapter. We have perceived that the English law had then almost attained to the stage where the socage tenants were regarded as the real owners of the soil, but that the principles of the English law of feuds still controlled to a considerable extent the nature of legal estates, as well as the devolution of title to landed property. Many reforms and innovations remained to be accomplished before the law of socage lands was modernized and free from the shackles of tenure. In the year 1664 the Statute of Frauds, 29 Car. II., c. 3,[1] which put an end to the common law mode of conveying freeholds without writings, by feoffment with livery of seisin alone, had not yet been passed in England, and was not so passed until many years after New York had for some purposes a like statute of its own.[2] The highly technical remedies for obtaining possession of lands wrongfully withheld were still in use except in the case of leaseholds. The jurisdiction of the English chancellors over uses and trusts, enabling such skilful modifications of the property right, and even the plenary equity jurisdiction in cases of mortgage, were very far from being worked out to completeness. Lord Nottingham, called the "father of English equity," had not yet ascended the "throne of equity." Consequently that system of jurisprudence which we now know in its entirety as the

[1] A.D. 1677; Jackson *ex dem.* v. Wood, 12 Johns. 73.

[2] *Supra*, p. 16; Duke's Laws of 1664, title "Conveyances, Deeds and Writings." Livery of seisin still remained in use, however, in New York.

"English law," or very often as "the old common law,"[1] was very far from having attained to the stage of development that it reached a century later, or in the year 1775, at the date of the battle of Concord and Lexington, which now serves to indicate the abolition of the legal authority of the old empire over this State and country.

Independence of the Crown accounts for few of the legal changes wrought here in the law relative to the socage tenure. From the year 1683 New York possessed a legislature of its own, which in 1691 became permanent.[2] Thereafter the acts of the New York assemblies, if not disapproved by the Crown, had the same energy that an act of Parliament enjoyed in England. But prior to the establishment of Independence the Assembly of New York made few changes in the law relating to the socage tenure.[3] After 1683 New York possessed a regular court of chancery of its own.[4] Had it not been for this tribunal the province would have been unable to avail itself (at least without the intervention of the Legislature) of those great remedies and equitable doctrines which grew up in England between the chancellorships of Lord Nottingham and of Lord Eldon, for with the latter the edictal power of promulgating new doctrines and remedies is regarded as closed by exhaustion, the entire circuit of English equity jurisdiction having been then fully delineated.

The establishment of a court of equity in New York, vesting, as it did, the judicial powers of the lord chancellor in the chief officer of the local court, perpetuated here that dual nature of real property entertained by English jurisprudence.[5] The very existence of this court in New York,

[1] This term "common law" is either generic or specific. It may refer to the jurisprudence of England, or to that law of England founded on custom, when not traceable to any statute. In very early writers it refers to *jus moribus constitutum*, or to case law; *supra*, p. 47, note.

[2] The grant of a legislature to New York is outlined in the Historical Introduction to the Grolier Bradford's N. Y. Laws of 1694.

[3] *Infra*, p. 58.

[4] See General Introduction to Hoffman's N. Y. Chancery Practice, for rise of the Court of Chancery in New York; also notes 2 and 24 to the Grolier Bradford's N. Y. Laws of 1694, pp. cv., cxxiii.

[5] *Infra*, c. VII.

even without an assertion of its jurisdiction, must have had a tendency to abate many inflexible rules of the common law, especially those relative to forfeitures and to mortgages of real estate.

It has been often stated that the introduction of the socage tenure into New York brought in the antecedent law of England relating to that tenure.[1] The great expositor of this law at that time still was Sir Edward Coke, whose Commentaries on Littleton had been published only some thirty-six years before the Duke of York's first grant for New York. Coke's Commentaries were so complete in themselves that they almost dispensed with the necessity of consulting the year books and their abridgments.[2] They possessed but one disadvantage for a lawyer practising in the province of New York: they were unfortunately published a few years prior to the reforms instituted by the acts removing the feudal burdens from the socage tenure.[3] But as these reforms were discussed in Coke's time, their spirit is not wanting in his commentaries, which therefore long continued to serve as a bridge between the old law and the modernized socage tenure.

In the year 1664 the adjudications on the text of the laws of England were in small compass, consisting of some ten folio volumes of cases in Chancery, and, exclusive of the eleven volumes of the year books, of some seventy volumes of common law reports. These, with the statutes at large, contained not only the law relating to land, but the entire *corpus juris* of England. The redundant exposition of the law had hardly begun. Lord Mansfield,[4] who did more to modernize the ancient law than any other judge, was not

[1] *Supra*, pp. 10, 21, 37; this was also stated in substance by counsel in Dutton *v.* Howell, *in temp.* Car. II., Shower's Par. Cas. 24; but in reference to another patent for lands to be held by the socage tenure.

[2] The learned Mr. Watkins, in his "Principles of Conveyancing," p. 4, points out the want of method in Coke. Yet the latter has proven an inexhaustible source of the law of English-speaking peoples. This Mr. Watkins admits.

[3] 12 Car. II., c. 24, A.D. 1660; *supra*, pp. 36–38.

[4] As this judge when Mr. Murray had been at one time the agent in England of the province of New York, his opinion that the province had been acquired by England through conquest has always carried great weight (Campbell *v.* Hall, Cowper, 204).

made Chief Justice of England until New York had been almost a century under British dominion. He had previously served as the agent for the province of New York. Until the publication of Blackstone's Commentaries,[1] Coke continued the great commentator on the socage tenure.

It was Blackstone who, *per saltum*, made the mediæval law modern in form and content. His Commentaries, by their lucidity and fine literary qualities, afforded a new and more modern basis for English institutions.[2] While it is quite true that Blackstone was much indebted to Hale's "Analysis" for the arrangement of the Commentaries, and that it is now the fashion to criticise his classification of the laws of England, yet Blackstone's is by far the greatest name in the literature of English law.[3] But had it not been for a very useful fiction of the common law—that it is presumed always to have been at that stage of development which it last attains—New York could not, without legislation, have derived the benefit of the improvement or modernization which thus took place in England between 1674 and 1775.[4]

Although in theory none of the laws or juridical doctrines of England developed subsequent to the year 1674 was part of the law of the province of New York, yet, in point of fact, at the outbreak of the War of Independence almost every incident of the English law relative to socage tenure then accorded with the law of New York. The differences between the two systems were only exceptions to general principles. This marked identity continued even after independence of the Crown was achieved. Years subsequent to this event Sir Edward Sugden deplored that the latest English subtleties of the law of real property should embarrass estates in the lands of this country. Not-

[1] A.D. 1756–69.

[2] Blackstone's editors have pointed out the necessary limitations on his doctrines. His text remains a miracle of condensation and learning.

[3] Blackstone's classification is well defended in the Introduction to Sandar's (American) edition of the "Institutes of Justinian," Chicago, 1876. His classification was substantially adopted in the great revision of the N. Y. Statutes in 1829. *Infra*, c. V.

[4] The English cases prior to this year, of authority in America, are enumerated in Tomlin's "Repertorium Juridicum," published about this period.

withstanding this identity, the early differences are not to be disregarded.

While we may assume, therefore, in the absence of any express adjudication to the contrary,[1] that in 1775 the law of the province of New York relative to the socage tenure was much the same as the law of England concerning lands in England held by the same tenure, yet differences existed between them. These differences were due either to the statute law, or, in at least one instance, to local custom. Until the year 1789,[2] when the English statutes were remodelled and re-enacted in the New York revision by Jones and Varick, it was a very perplexing question, What portions of the English statutes were in force in New York? Smith, the historian of the province and a lawyer of prominence at its Bar, alluded to the uncertainty in the year 1757.[3] Yet his father, the Chief Justice of New York, had in the year 1700 officially stated the general opinion, that the English statutes operative here were only those declaratory of the common law.[4] Here, again, a distinction is often made, for the purpose of determining this question, between plantations acquired by England through discovery or through conquest;[5] but Chitty intimates[6] very plainly that there is little force in this distinction, as no part of the law of England is operative *ex proprio vigore* beyond the limits of England, but only by force of some legislative enactment or prerogative action, which must determine the question. Thereafter the acts of the English Parliament are of course not operative unless the province be therein included.[7]

[1] See Van Rensselaer *v.* Hayes, 19 N. Y., at top of p. 76.

[2] C. 90, sec. 88, Laws of 1788; *infra*, pp. 77, 78.

[3] History of N. Y., first London edit., *anno* 1757, p. 243; Amer. edit. of 1829, II., 47, note.

[4] Doc. rel. Col. Hist. N. Y., IV., 828.

[5] Clark's "Colonial Law," p. 15; Stephens' Bla. Com., I., 105; Burge's Int'd to Commentaries on Colonial and Foreign Law, xxxv.; *supra*, pp. 9, 22.

[6] *Supra*, pp. 9, 22; Chitty's "Prerogatives of the Crown," pp. 32, 33, and notes.

[7] Clark's Col. Law, 16; Burge, Int'd., xxxi.; Douglass' Summary, I., 213; Chalmers' Col. Opin., 211, 212; Pownall's Colonies, 102; Forsythe's Opin., c. I.; 4 Mod. 222; Rex *v.* Vaughan, 4 Burr, 2494, 2500; Boehm *v.* Engle, 1 Dallas, 15; Morris' Lessee *v.* Vanderen, 1 Dallas, 64, 67; Respublica *v.* Mesca, 1 Dallas, 73, 75.

This opinion accords with the more modern view already indicated.[1] Yet this whole subject is one which has always been involved in considerable obscurity, the courts of each of the plantations having in practice determined the question largely for themselves.[2]

The obscurity noticed was much promoted by the different uses of the term "common law," it being sometimes intended thereby to exclude the statute law,[3] and at others to include all the law of England, both statute and common. But the uncertainty indicated was never exhibited in the higher tribunals of England, for there the general rule was well settled.[4] Such uncertainty was manifested rather in the attempt to apply in courts of first instance in the British colonies statutes of England which were not originally intended to have an extra-territorial application, and were not suitable to the newer conditions of society. The general rule was that English statutes passed anterior to the settlement or conquest of an acquired dominion were, when declaratory of the common law, in force there as a part of the English common law.[5] Later statutes of England became operative through some legislative enactment only. These were the general rules in New York.[6]

Whenever an act of Parliament specially named or included New York and the other plantations, they were bound by it, according to the constitution then prevailing in

[1] *Supra*, p. 23; Forsythe's Opinions, c. I. and note; and see Quincy's "Colonial Reports of Massachusetts," 520 and note.

[2] Smith's History N. Y., I., 243; cf. Tucker's Blackstone's Commentaries, I., 393; Dane's Abridgment, VI., art. 7, sec. 2, p. 606; Jackson *ex dem. v.* Gilchrist, 15 Johns. at p. 110; Lessees of Levy *v.* M'Cartee, 6 Peters, 102–110; Sharswood's Law Lectures, 194; Story on the Constitution, I., sec. 187; Forsythe's Opinions, c. I. and note; Quincy's Mass. Report, 520 and note; Yates' Select Cases, 111.

[3] Lessees of Levy *v.* M'Cartee, 6 Peters, 102, 110; Patterson *v.* Winn, 5 Peters, at p. 241; *et supra*, c. II., p. 47, note.

[4] Forsythe's Opinions, c. I., and note; 2 Peere Wm.'s, 75, state the rule of the Privy Council in England, which was the high Court of Appeal for the English colonies, including New York. See also Appendix to Burton's "Compendium of the Law of Real Prop.," for a general discussion of this subject.

[5] Patterson *v.* Winn, 5 Peters, at p. 241.

[6] Doc. rel. Col. Hist. N. Y., IV., 828; *infra*, c. V.

the British Empire.[1] Thus by an act of 5 Geo. II., c. VII., the whole of debtors' real estate in the plantations was made assets for the payment of certain debts. The remedy given by this statute was ultimately extended in New York far beyond its original import.[2]

The differences in the laws of England and of the province of New York, due to the force of the customs of New York, could not, at so early a period, have been many. But there is one notable instance—the custom in the province of New York of conveying estates of *femes covert* by deed.[3] In England *femes covert* could then convey their interests in real estate only by the common law modes of levying a fine or suffering a common recovery.[4] Ordinarily these acts of record required a separate acknowledgment of the wife and the consent of the husband.[5] It would seem that in the province of New York prior to 1771 the interests in real property of a *feme covert* might by custom be conveyed by a deed not even acknowledged if it were made by her in conjunction with her husband.[6] The validity of such a mode of assurance is said to depend altogether on custom.[7] In the year 1771 this custom was formally recognized by an act of the Legislature, and prior conveyances made in conformity with it were declared valid.[8]

The practice, very general in the province, of recording deeds,[9] acknowledged before some public officer who was

[1] *Supra*, p. 20.

[2] Chancellor Jones; N. Y. Hist. So. Col. for 1821, p. 347. Before this time a creditor could obtain possession of one half of his debtor's real estate by writ of *elegit*. Waters *v.* Stuart, 1 Caine's Cases, 47, 70; Catlin *v.* Jackson, 8 Johns. 530, 547.

[3] Albany Fire Ins. Co. *v.* Bay, 4 N. Y. at p. 31.

[4] See note to 2 Bla. Com. 351; Constantine *v.* Van Winkle, 6 Hill, 177; Jackson *ex dem. v.* Holloway, 7 Johns. 81, 86; Whitbeck *v.* Cook, 15 Johns. 545.

[5] Sheppard's "Touchstone," 7; Albany Fire Ins. Co. *v.* Bay, 4 N. Y. at pp. 13 and 31.

[6] Van Winkle *v.* Constantine, 10 N. Y. 422.

[7] Jackson *v.* Gilchrist, 15 Johns. 114; Constantine *v.* Van Winkle, 6 Hill, 177; Van Winkle *v.* Constantine, 10 N. Y. 422; it probably extended to leasehold conveyances. See Jackson *ex dem. v.* Holloway, 7 Johns. 81, 86.

[8] Van Schaack's N. Y. Laws, 611, 765. By this act her formal acknowledgment apart from her husband was obligatory for the future. See also 2 J. & V. 84.

[9] If we disregard the Duke's Laws and the acts of 1683–84, there was no

without any apparent authority to take such acknowledgments, has also been ascribed to the force of custom.[1] This practice or usage was, however, probably due to an ordinance of the Crown governor, passed in 1723,[2] and before that time to the earlier statutes of New York. The laws of New Netherland had contained some provisions for the acknowledging and the recording of deeds,[3] and after the capitulation of 1664 the Duke's Laws contained a like provision.[4] The act of November 3d, 1683,[5] required the acknowledgment to be made before a justice of the peace. This act was followed by one in 1684,[6] and that of 1684 by the ordinance of 1723, above mentioned. This ordinance and an act passed in 1753, referring to acknowledgments of mortgages,[7] were for many years all the law that existed. On February 16th, 1771, acknowledgments of deeds were, however, regulated for the future;[8] they were to be made before one of the members of the council, or the judges of the Supreme and the Common Pleas courts, or a master in Chancery. After the War of Independence these laws were fully revised by Jones and Varick.[9] The acts on this subject passed subsequently to this revision and prior to the year 1829 were authoritatively collected as an appendix to the Revised Statutes of 1829, and may be there found.[10]

law of the province after the Resolution of 1691 (*infra*, p. 58) requiring deeds to be recorded. They were recorded probably in view of the uncertainty as to whether the Statute of Enrolments extended here. Jackson *ex dem. v.* Meyers, 3 Johns. 388, 394.

[1] Van Winkle *v.* Constantine, 10 N. Y. at p. 429.

[2] Bradford's N. Y. Laws, edition of 1726, at the end. It would seem to be the opinion that the demise of the Governor did not determine an ordinance. Chalmers' Col. Opinions, 254, 302, 326.

[3] Laws and Ordinances of New Netherland, 459.

[4] Title "Records" and "Conveyances, Deeds and Writings," *supra*, p. 13.

[5] "An Act to prevent frauds in the conveyancing of lands," *supra*, p. 19.

[6] "An Act to prevent deceipt and fforgerye," *supra*, p. 19.

[7] 2 L. & S. 19.

[8] Van Schaack, 611, as amended by the Act of March 8th, 1773, Van Schaack, 765; Hunt *v.* Johnson, 19 N. Y. 279, 291.

[9] 2 J. & V. 92, 266. It is said in Jackson *ex dem. v.* Dubois, 4 Johns. 216, that prior to this act there was no necessity of registering mortgages; but see *infra*, p. 87; Jackson *ex dem. v.* Holloway, 7 Johns. 81, 86; Hunt *v.* Johnson, 19 N. Y. 279, 291.

[10] Vol. III., p. 25, *et seq.* The best treatises extant on this entire subject are

The differences made by acts of the Assembly of the province of New York in the law of New York concerning lands held by the socage tenure were necessarily very few, and related to form rather than to substance.[1] The powers of the Provincial Legislature were in this respect restricted. All their acts were by a fundamental limitation bound to conform as near as might be to the laws and statutes of the kingdom of England.[2] By this organic restriction it was intended to prevent any legislation of a kind so radical as to violate the *rationale* or animating principles of the jurisprudence of the parent land.[3] It certainly prevented any great innovation by the Provincial Assembly, and hence their subsequent modifications of the English law relating to the socage tenure were not great. The acts of the Dongan assemblies of 1683–84–85[4] were far more original, while the Duke of York's laws of 1664–65 contained some provisions entirely novel in English law.

By a very singular resolution of the lower house of Assembly, adopted April 24th, 1691, "all the laws consented to by the General Assembly under James, Duke of York, . . . not being observed and not ratified and approved, . . . were declared null and void."[5] The legal effect of this declaratory resolution of a single chamber of a bicameral Legislature has been greatly debated, and the

in the form of a pamphlet, by John Wallis, Esq., attorney, attached to the brief of the Honorable David Dudley Field, of counsel in Van Winkle *v.* Constantine (10 N. Y.), N. Y. State Library, Albany, and a brief of the Hon. George Hoadly in Blackman *v.* Riley, 138 N. Y. 318 (*vid.* Court of Appeals Records containing briefs in full).

[1] This fact is seen in the few statutes of New York referred to in the appendices to Jones & Varick's Revision, and in the R. S. of 1828–29. The major part of the acts of the Provincial Assembly after 1691 were local or private acts, and not reformatory of the common law. The revisers after Independence failed to include the Provincial Statutes in their revisions.

[2] Doc. rel. Col. Hist. N. Y., III., 623; *supra*, pp. 20, 23.

[3] The commissions from the Crown to the royal governors of the province were the authority for the assemblies; after the year 1691 these commissions contain the limitation noticed. By act of the English Parliament, 7 and 8 W. III., c. 22, acts in conflict with an act of the British Parliament were made void.

[4] *Supra*, c. I., pp. 17–20.

[5] Journal of the N. Y. Assembly, April 24th, 1691, p. 8; *et supra*, p. 21.

authorities differ upon it.[1] It is difficult to concede to the resolution on principle any legal force whatever,[2] but in practice the legislatures subsequent to 1691 may have disregarded the prior legislation. The revisers of the New York Colonial Statutes were uniformly directed by the Legislature to begin their revisions with the "Happy Revolution," or with the laws of 1691, thus excluding by implication from the region of statute law the acts passed under the Stuarts or prior to 1691. But such a direction could have no binding effect either on the Crown or on the fundamental constitution of the province. It could at best be only evidence of non-user, which by the common law is inconsequential.[3] The courts of New York in the present century have, however, given effect to the resolution of 1691, or have certainly intimated that such resolution was correctly expressive of the facts that the "Duke's Laws" of 1664–65 and the acts of the Dongan assemblies of 1683, 1684 and 1685 were repealed [4] by the year 1691. The legal effect of the resolution would therefore seem to be no longer open to further discussion, at least in New York.[5]

This resolution of 1691 was merely declaratory; it may possibly have been intended to convey an idea that the legislation then attempted to be proscribed was either contrary to the laws of England, and therefore void, or else of so informal and inofficious a character as to be unworthy of any future consideration. It was *brutum fulmen* by the constitution of the province, and it is to be given effect now

[1] These authorities are generally presented in the Historical Introduction to the Grolier reprint of Bradford's N. Y. Laws of 1694; Van Winkle *v.* Constantine, 10 N. Y. 422; 6 Hill, 181; Brookhaven Trustees *v.* Strong, 60 N. Y. 56, 68.

[2] Lieut.-Gov. Colden intimated in 1732 that the laws affected by this resolution were those made by the governor and council alone without the concurrence of the Assembly. 1 Doc. Hist. N. Y. 378.

[3] See Int'd. to Grolier Bradford's N. Y. Laws of 1694, p. lxxxii.

[4] Van Winkle *v.* Constantine, 10 N. Y. 422, 426; Constantine *v.* Van Winkle, 6 Hill, 177.

[5] It is quite different in England; there, in a case involving a succession to hereditary honors or estates, the decision of the courts of the State of New York on the effect of this resolution is, of course, not binding as authority.

rather on the principle "*communis error facit jus*" than because it was legislative in effect.[1]

For the reasons already stated, the differences made in the law of New York concerning the socage tenure by the action of the assemblies of the province of New York were after the year 1691 inconsiderable. The effect of the laws passed prior to that year has been also debated.[2] In the year 1710 the possession of any lands from October 30th, 1700, to September 1st, 1713, without any adverse claim or entry, was declared to confer a good title on the possessor.[3] By the same act the records of deeds were made evidence in themselves, while the Dutch words *onroerende* and *vaste staat*, commonly used in certain legal instruments by those of Dutch descent,[4] were declared to pass a fee simple. A later act declared that those dying seised of real estate in New York prior to November 1st, 1683, should be deemed to have been naturalized citizens for all legal acts and purposes.[5] This law was intended to avoid certain claims of escheats and lack of heritable blood, and was passed in the interest of the heirs of the former Dutch proprietors.

In 1708, after the subject had been reformed in England,[6] the easier partition of socage lands held in joint tenancy or in common was attempted in New York.[7] In 1753 mortgages of real estate were again required to be acknowledged;[8] the acknowledgment might be made before one of the council for the province, a justice of the Supreme Court, or a judge of the Common Pleas. Priority of record then conferred priority of lien in any court of record within the

[1] The arguments on this point are given in the Hist. Int'd. to Grolier Bradford's N. Y. Laws of 1694, c. II.

[2] *Supra*, pp. 16–20.

[3] C. 216, 1 L. & S., p. 84; cf. English act, 21 Jac. 1, c. 16; *supra*, p. 17.

[4] The articles of capitulation of 1664 preserved the Dutch law concerning inheritances for the use of the *antenati*, *supra*, p. 14. Many *postnati*, however, made wills in Dutch and according to Dutch law until a late period in the last century.

[5] C. 293, 1 L. & S., 112; Van Schaack, 561; *supra*, pp. 14, 15.

[6] 8 and 9 W. III., c. 31, and 8 and 4 Anne, c. 18.

[7] C. 183, 1 L. & S., 75. See Appendix to R. S., III., for subsequent legislation on this subject.

[8] C. 124, 2 L. & S., 19.

province.[1] As it was evidently the opinion[2] that the writ of *cessavit per biennium*, which was by force of the Statute of Westminster 2d, did not lie in this province, the quit-rents due to the Crown were sought to be enforced by aid of special acts of Assembly.[3]

The revision of the provincial lawyers, Livingston and Smith, includes the acts of the New York Assembly passed between the years 1691 and 1763. The only other revision of the laws of the province is that of Peter Van Schaack, a counsellor-at-law, made about the year 1774.[4] It includes the laws embodied in the earlier revision, and also those enacted after 1763 and prior to 1774. Very few of these later laws are of much interest to our subject, and not one of them made any essential change in the antecedent nature or law of the socage tenure; but it may be well to notice the condition of the acts of Assembly.

The printed evidences of the laws of the province of New York or of those of our laws passed prior to the War of Independence are very few. William Bradford compiled and published the first edition at New York in the year 1694; it is now among the rarest and most costly of Americana. A fine fac-simile of this edition, with notes, etc., has lately been issued (1894) under the auspices of the Grolier Club, of New York, and is often referred to in this essay. The Duke's Laws of 1664 and 1665 have been published by the New York Historical Society[5] and by the State of Pennsylvania.[6] The Dongan Laws of 1683, 1684 and 1685 have

[1] The Duke's Laws of 1664, title "Conveyances, Deeds and Writings," had required mortgages to be in writing and acknowledged before some justice of the peace or superior officer of the government. An act passed Nov. 3, 1683, entitled "An Act to prevent frauds in conveyancing of lands" and a "Bill to prevent deceipt and fforgerye," passed Oct. 22, 1684, contained like provisions. And see *supra*, pp. 13–19.

[2] Doc. rel. Col. Hist. N. Y., V., 370. Messrs. Jones & Varick thought otherwise, and included the statute in their revision (Vol. II., p. 108).

[3] 1 L. & S., 46; 2 *ibid.* 63, 237, 256; Van Schaack, 515; De Lancey *v.* Piepgras, 138 N. Y. 26. See this subject discussed at p. 42, *supra*.

[4] The Laws and Ordinances of New Netherland were collected by Dr. O. Callaghan from the Holland documents and other sources, and a translation was published in 1868, Albany, Weed, Parsons & Co. This work gives references to the original sources of the laws.

[5] In the year 1809.

[6] In the year 1879.

never been published. They are, however, in the State Library at Albany, of which the regents of the university are the trustees. Copies of them, certified under the hand and seal of the Board of Regents, may be read in evidence in the courts of New York with the same force and effect as the originals.[1]

In 1710 Bradford issued another title-page edition, which has a quasi-official authority, for it was published in obedience to an order of the Assembly ;[2] it includes acts between 1691 and 1709, but not all. In 1713 Bradford struck off another title-page edition, including acts passed between 1709 and 1713. This was followed by an edition published in 1726. In 1719 the Privy Council in England would appear to have encouraged an edition of the laws to be printed. At all events, John Baskett, the Crown printer, printed an edition of the laws of New York, passed between 1691 and 1718 (London, MDCCXIX.). This edition has no official authority, but is useful as indicating in the margin the laws approved by the Crown. Bradford's editions of the laws of New York do not pretend to include any laws passed anterior to the year 1691. After 1694 the laws were printed session by session.

In 1741 the Legislature, noting the incorrectness of all the printed copies of the laws of New York,[3] resolved to appoint a reviser of the laws, but nothing came of it. On November 24th, 1750, a bill to revise the laws of New York was, however, passed, and led to the revision by William Livingston and William Smith.[4] The law authorizing such revision, recites that the laws of New York had thitherto been very incorrectly printed and bound up.[5] In 1753 the lords justices of England recommended a codification of the laws of New York. This the Assembly declined on account of the expense lately incurred in the revision by Messrs. Livingston and Smith.[6] The last revision of the laws of the

[1] C. 120, Laws of 1881.
[2] Journ. N. Y. Assembly, Nov. 12, 1709.
[3] Journal N. Y. Assembly, p. 823.
[4] New York, Vol. I., MDCCLII. ; Vol. II., MDCCLXII.
[5] 1 L. & S., p. 443.
[6] Journ. N. Y. Assembly, May 30th, 1753, and June 1st, 1753.

province was undertaken by Peter Van Schaack, counsellor-at-law, pursuant to an act of 1772.[1] This revision contains, in addition to the laws included by Messrs. Livingston and Smith, acts passed between 1763 and March 8th, 1773 (13 Geo. III.). The remaining acts of the Assembly passed in 1774 and 1775 were printed by the public printer, Hugh Gaine.

Such are the accessible printed evidences of the acts of the Assembly of the province of New York. But they do not purport to be the exclusive evidence of the laws of New York prior to its independence of the Crown. There are, besides the acts from 1664 to 1691, fourteen hundred subsequent acts of the Assembly which remain wholly unprinted. It is understood that a Statutory Revision Committee is now engaged in the work of preparing all the colonial laws for publication.[2]

At common law,[3] aliens could not take lands by descent, or hold lands acquired by purchase as against the King after office found, and such was the general rule in the province of New York.[4] The Dutch government had been extremely liberal in its policy toward the English who dwelt within the limits of New Netherland, permitting them to acquire lands and even to devise them.[5] It has been already stated that after the conquest the English required those who held their lands under the West India Company to take out confirmations by the Duke's governor.[6] The New Netherland *antenati* who chose to remain within the province of New York became, after the treaties of Breda and Westminster, subjects of the kings of England by a

[1] C. 1543, Van Schaack's Laws of New York, 676.

[2] C. 125 Laws of 1891. The mode of proving an act of the Assembly of the Province of New York is discussed in c. III., Hist. Int'd to Grolier Bradford's N. Y. Laws of 1694.

[3] Mick *v.* Mick, 10 Wend. 379; 2 Bla. Com. 274, 293; Goodrich *v.* Russel, 42 N. Y. 177; Mooers *v.* White, 6 Johns. Ch. 360.

[4] Doc. rel. Col. Hist. N. Y., V., 496, 497; but the English Stat. 11 and 12 W. III., c. 6, was not part of such law; Jackson *v.* Green, 7 Wend, 333.

[5] *Supra*, p. 13. "Charter of Freedoms and Exemptions," Laws and Ord. New Neth., 467. Successions *ab intestato*, or to the estate of an Englishman dying without will, were according to Dutch law, *ibid.*

[6] *Supra*, c. I., pp. 13–15.

process of collective naturalization deriving its effect from the cessions alone.[1] But this principle was to some extent arrested by the terms of the capitulation of 1664.[2]

The effect actually given to the capitulation articles of 1664 is perhaps unnecessary to our subject, being largely historical at the present time. Many of the principal inhabitants of New Netherland indubitably became subjects of England by naturalization or else by taking the oath of allegiance after the cession.[3] To put the matter at rest, in 1683 "an act for naturalizing all those of foreign nations at present inhabiting within this province and professing Christianity, and for encouragement of others to come and settle, etc.,"[4] was passed. In 1710 followed another act[5] "for the better assurance of lands in the colony," conferring a perfect right by a prescription of ten years prior and three years subsequent to the act. In 1715 the Assembly enacted that all inhabitants of foreign birth dying seised of lands or tenements in the province should be esteemed to have been naturalized.[6] A final act was passed in the year 1770, curing all former defects in the titles of those citizens who were in possession of estates under patent or purchase granted to an alien inhabitant.[7] A great number of persons were naturalized by special acts of the legislature of the province.[8] The War of Independence and the establishment of a new State by a successful revolution gave rise to many questions about status and citizenship difficult of solution. These questions and the consideration of the present law concerning aliens are reserved for separate mention, in order not to interrupt the narrative at this point.[9]

Before leaving the present subject, the main differences

[1] See opinions of Pothier, Felix, and Heftner; Wheat. Elements of Intern. Law, Appendix, 681.

[2] 2 R. L. of 1813, Appendix No. I.; *supra*, p. 14 *et seq.*

[3] See authorities, etc., Grolier Bradford's N. Y. Laws of 1694, Historical Introduction, pp. xlviii-l., lvii., lix.; *supra*, p. 14 *et seq.*

[4] See act in MS., State Library, Albany, passed Nov. 1, 1683.

[5] Doc. rel. Col. Hist. N. Y., V., 495; Van Schaack, 82; 1 L. & S. 84.

[6] Van Schaack, 97; 1 L. & S. 112; Lynch *v.* Clarke, 1 Sandf. Ch. 583, 648.

[7] Van Schaack, 561.

[8] Lynch *v.* Clarke, 1 Sandf. Ch. 583, 648.

[9] Appendix No. II.; *et infra*, c. IV.

between the laws of England and of the province of New York relating to land, there would seem to be one question which from its needless complexity requires further mention—the extent of the survival of the law of New Netherland after the English occupation in 1664, when the province first became New York. In the discussion which has arisen around this question the difficulty in the application of rigid doctrines of an old jurisprudence to new and sparsely settled communities becomes apparent. It was a firm doctrine of the common law that the laws of a conquered or a ceded State prevailed until they were repealed by the conqueror or successor in the government,[1] and this principle has been frequently invoked in New York[2] as being a part of the common law adopted by the State constitution.[3] To avoid the effect of this apparently incontrovertible proposition, other litigants have fallen back to the original justification of King Charles II. and his political agents for a flagrant act of spoliation committed in the year 1664, and assert that the States-general never had a title to New Netherland valid by the law of nations, the soil being always English territory *de jure*. They therefore hold that the Dutch Government and, as a consequence, its jurisprudence never had any rightful place in the territory now known as New York.[4] The literature of this discussion is voluminous, and its presumptions do not always precisely accord with

[1] *Supra*, p. 55; Canal Comm'rs *v.* People, 5 Wend. 445, 461; Canal Appraisers *v.* People, 17 Wend. 571, 616; 1 Bla. Comm. 107; Rex *v.* Vaughan, 4 Burr, 2494, 2500; 2 P. Wms. 75; Blankard *v.* Galdy, Salk. 411.

[2] Mr. O'Conor's argument in Wetmore *v.* Story, 22 Barb. 433, 439; Mr. Att'y-Gen'l's argument in Jackson *ex dem.* *v.* Gilchrist, 15 Johns. 89, 94; Story *v.* El. R. R. Co., 3 Abb. N. C. 478, 489; Canal Comm'rs *v.* People, 5 Wend. 423; Canal Appraisers *v.* People, 17 Wend. 571, 583; Hoffman's Treatise on the Corp. of N. Y. 263, 265, and 291, cited in Dunham *v.* Williams, 37 N. Y. 253; Van Schaack, N. Y. Laws, 83, 97; Chalmers' Polit. Annals, 574; Chalmers' Revolt of Colonies, I., 117.

[3] Const. of 1777, sec. 37; Const. 1822–23, Art. VII.; Const. 1846, Art. I.; Const. 1894–95, Art. I.

[4] Mortimer *v.* N. Y. El. R. R., 6 N. Y. Supp. 898; 57 N. Y. Supr. Ct. R. 244; Hine *v.* N. Y. El. R. R., 7 N. Y. Supp. 464; cf. Van Giesen *v.* Bridgford, 83 N. Y. 348; Levy *v.* Levy, 33 N. Y. 97, 107; Dunham *v.* Williams, 37 N. Y. 251; People *v.* Canal Appraisers, 33 N. Y. 461, 499; Overbagh *v.* Patrie, 8 Barb. 28, 41; Smith *v.* City of Rochester, 92 N. Y. 463, 482.

the historical evidences accumulated by more patient investigators.

Those who have recourse to the documents find that the English political authorities conceded that the title to the province was by conquest. By various ordinances and legislative enactments after their occupation of New York, the English formally substituted their own laws and jurisprudence for those of their predecessor in the sovereignty.[1] Therefore the discussion in courts of first instance in suits between private persons—concerning the better right and title to this territory of two sovereign governments in the seventeenth century—would seem to be somewhat beyond the matter in hand, even if such an issue is ever within the range of ordinary judicial inquiry.

There are, however, exceptions to the universality of the statement that the English substituted their own laws so as to efface all vestiges of the law of New Netherland. Certain pieces of property, when deducing title from Dutch charters, ground briefs and transports, preserved necessarily some characteristics of the Dutch tenure.[2] This resulted either from the terms of the articles of capitulation of 1664 (confirmed in 1674 after the final cession under the treaty of Westminster), by which certain rights were guaranteed to the Dutch inhabitants,[3] or else from the terms of the English confirmation of the Dutch ground briefs or transports.[4] It

[1] Lord Mansfield (at one time New York agent at the British Court) in Campbell *v.* Hall, 20 State Trials, 239; s. c. Cowp. 204; Penn *v.* Lord Baltimore, 1 Ves. Sr. 444, 451; Sir John Randolph in Smith's Hist'y N. Y. (London edition of 1757), p. 248; see also note on p. xxxi. 1 Wall, Jr.'s, U. S. Cir. Ct. R.; Bartow *v.* Draper, 5 Duer, 190, 142; Story *v.* N. Y. El. R. R. Co., 3 Abb. N. C. 489; Van Giesen *v.* Bridgford, 18 Hun, 73; 83 N. Y. 348; Dunham *v.* Williams, 37 N. Y. 251; Levy *v.* Levy, 33 N. Y. 97, 107; cf. note 17 Abb. N. C. 439, giving the various authorities. Other authorities are cited in the Historical Introduction to the Grolier Bradford's N. Y. Laws of 1694.

[2] Denton *v.* Jackson, 2 Johns. Ch. 324; Hempstead *v.* Hempstead, 2 Wend. 109; 1 Hopk. Ch. 288, 293; People *v.* Clarke, 10 Barb. 120, 141; Dunham *v.* Williams, 37 N. Y. 251; rev'g 36 Barb. 136; Overbagh *v.* Patrie, 8 Barb. 28, 41; Van Giesen *v.* Bridgford, 18 Hun, 73, 80; affi'd, 83 N. Y. 348, People *v.* Livingston, 8 Barb. 253, 276; Story *v.* N. Y. El. R. R. Co., 3 Abb. N. C. 478.

[3] 2 R. L. of N. Y., *anno* 1813, Appendix I.; Dunham *v.* Williams, 37 N. Y. 251, 253; Smith *v.* City of Rochester, 92 N. Y. 463, 482; Pea Patch Case, 1 Wall, Jr., Appendix, p. xxviii.

[4] Record of Court of Assizes, 25 March, 1667, in State Library, Alba-

is obvious, therefore, that a title to particular pieces of real property in New York, when lawfully deduced from a Dutch source, must, notwithstanding that the English law in its entirety was very soon substituted for the Dutch law, long continue to preserve some of the characteristics of Dutch tenure; and that as between different adjacent owners, deducing titles under Dutch ground briefs or transports, Dutch wills,[1] or by successions *ab intestato* from Dutch subjects, the law of New Netherland must occasionally be invoked in order to determine reciprocal rights: unless the English confirmation of particular ground briefs and the changes in the tenure at the time of the British occupation have substituted absolutely the English law relating to the socage tenure. The adjudged cases show that an unqualified substitution could not be made so as to avoid all reference to the Dutch law.

The few survivals of the character indicated would seem to class themselves about the following subjects: (1) Rights of such adjacent owners as between themselves or against each other;[2] (2) their several rights as against the Dutch civil authorities;[3] and (3) their several rights against the political successors to the Dutch government—*i.e.*, the English, and later on the Republican, governments.[4] Nearly all the adjudged cases on this subject would appear to adapt themselves to this classification, and not to be in conflict with the statement of other authorities which conclusively hold for present purposes that the English law came in with their occupation of the country in 1664.[5] This latter judi-

ny. People *v.* Livingston, 8 Barb. 253, 276; see confirmation in Bogardus *v.* Trinity Church, 4 Sandf. Ch. 699.

[1] Van Giesen *v.* Bridgford, 18 Hun, 73; 83 N. Y. 348.

[2] These might be defined wholly by the law of New Netherland—*e.g.*, where both owners held under original Dutch transports. Smith *v.* City of Rochester, 92 N. Y. 463, 482.

[3] Dunham *v.* Williams, 37 N. Y. 251; Story *v.* N. Y. El. R. R. Co., 3 Abb. N. C. 478, 489. There is an excellent discussion of the civil law relating to *viæ vicinales* and *viæ publicæ* in the brief of Mr. Van Nest in Abendroth *v.* N. Y. El. R. R. Co., Ct. of Appeals Cases in the year 1890.

[4] Hoffman's "Treatise upon the Estate," etc., of the City of New York (2d edition), I., 303 *et seq.*

[5] Canal Appraisers *v.* People, 17 Wend. 583; De Ruyter *v.* St. Peter's Church, 3 Barb. Ch. 119, 122; Humbert *v.* Trinity Church, 24 Wend. 587, 623; Mayor, etc. *v.* Hart, 95 N. Y. 443, 450.

cial inference, though made long afterward, and without access to early political documents, is quite in accord with the results of legislation. It lacks precision only in not fully indicating that this result was due to the legislation of the English authorities and not to some effect of the English claim to title by original discovery and occupation.[1]

That the English did claim New Netherland by right of discovery is not doubtful,[2] but nevertheless they took title to it by cession, and then they introduced their own law formally and by edicts of no uncertain sound. Of what consequence, then, in this aspect is a further judicial inquiry as to the origin of the English title to New Netherland, especially when we remember that the text of the great English commentator[3] relative to the mode in which English law was introduced into colonies of England is purely figurative, and intended only to summarize the result of many causes.

The limited survival after 1664 of that part of the law of New Netherland just indicated cannot have any proper application to that vast body of land which, though lying within the limits of New Netherland, was never subjected by the Dutch to the actual dominion of private ownership, nor held under Dutch ground briefs or transports.[4] The ultimate title to all such lands rests solely on the Duke of York's patent, crown patents, or state patents.[5] Nor does it seem quite clear that the law of New Netherland should be held to apply to the title to streets laid out after the year 1664 through lands held originally under Dutch tenure and titles; although such was the undoubted opinion of the late Judge Hoffman,[6] who gave much attention to this subject.

[1] See *supra*, p. 22. The argument on this point is more fully given in the Introduction to Grolier Bradford's N. Y. Laws of 1694, if the reader care to consider this subject any further.

[2] Shively *v.* Bowlby, 152 U. S. 1, 14.

[3] 1 Bla. Com. 107; cf. Mr. Gould's note 3, p. 68 of his "Treatise on the Law of Waters" (2d edit.).

[4] People *v.* Livingston, 8 Barb. 253, 276; People *v.* Clarke, 10 Barb. 120, 141; affi'd 11 Barb. 337; 9 N. Y. 349.

[5] Appendix No. I., this volume; People *v.* Livingston, *ibid. sup.*

[6] Hoffman's "Treatise upon the Estate of Corp. of City of N. Y." (2d edit.), I. 312; Bartow *v.* Draper, 5 Duer, 130, 142.

In the first place, these Dutch tenures were pursuant to the English laws of 1664–65 [1] converted into socage tenures before the streets were established or dedicated. The presumption of law soon was and now is that such English laws were complied with.[2] The lands thus became socage lands, and the title to streets opened afterward through socage lands must naturally have been determined by the principles of the English law. Nor could the Lord Proprietor assert that he succeeded to the rights of the Dutch sovereign in regard to the soil of such new streets; for as proprietary the Duke's powers were wholly defined by the patent from the King.[3] Indeed, a limited and successor government can rarely succeed to the political or feudal rights of its predecessor in the political power. It is prevented from so doing by the limitations on its own sovereignty or power.[4]

There may be other instances where the jurisprudence of New Netherland has had an influence on the subsequent procedure of the courts of New York.[5] Their consideration is not pertinent to our subject, as these exceptions to the ordinary course of procedure are probably referable rather to the usages or customs of the province than to any formal continuation of the laws of New Netherland.

With the few exceptions specially noticed,[6] the law of New Netherland could have had little force in the province of New York after the close of the seventeenth century, for the English sovereign authorities had then substantially completed the formal substitution of their own laws, by various ordinances and commissions.[7] If this is true of the

[1] *Supra*, pp. 13, 14.

[2] *Supra*, p. 14.

[3] Appendix No. I., this volume.

[4] Louisiana State Bank *v.* Orleans Nav. Co., 8 La. 294; Guillotte *v.* New Orleans, 12 La. 432; cf. the arguments in Dutton *v.* Howell, Shower's Par. Cas. 24.

[5] Smith *v.* Rentz, 131 N. Y. 169, 175; Magown *v.* Sinclair, 5 Daly, 63, 67; *re* Brick's Estate, 15 Abb. Pr. 12.

[6] The statutes of the province show one or two other exceptions—Van S., I., 83, 97—relating to interpretation of Dutch wills, etc.; Law of 29 Oct., 1684, relating to Dutch mortgages; but these affect rights guaranteed by the articles of surrender in 1664.

[7] This subject is treated of at length in the Historical Introduction to the Grolier Edit. of Bradford's N. Y. Laws of 1694.

provincial period, it is of course *à fortiori* true since the birth of the State. Thus it is apparently unnecessary to resort to the origin of the English title to New Netherland in order to get rid of the doctrine, that the laws of the conquered remained in force until abrogated by the conqueror.[1] That the English title to New Netherland was derivative was always conceded by the law officers of the Crown subsequent to the cession of the province after the treaty of Westminster.[2] To attempt to reverse this admission and the facts and the verdict of history seems futile; and as the mode of the introduction of English law is capable of ascertainment, it is also unnecessary.

In this connection it should be observed that there cannot be a rigid application of the statements of the great English commentators concerning the introduction of the common law into the American possessions.[3] Their statement that the laws of the conquered remain in force until abrogated by the conqueror, is subject to many limitations not always laid down. For instance, it has no application when the conquered have abandoned their ancient home to the subjects of the conqueror.[4] It would seem to have equally little application to New York after the death or the naturalization of the Dutch *antenati*.[5] But it is unnecessary to pursue further limitations of this doctrine.

The burden of proof is on him who asserts that the common law of the English was not in force in the province of New York,[6] and this rule in itself is for present purposes conclusive in most of its aspects. But by this it is not meant that all the common law of England was so put in force here, but only in so far as it was suited to the new political conditions; for particular institutes of our law

[1] *Supra*, c. I., p. 24.

[2] Sir John Werden *in re* Penn's grant; cited in Pea Patch Island Case, 1 Wallace, Jr., U. S. Cir. Ct. R. Appendix, p. xxxi., note.

[3] Note to 17 Abb. New Cas., p. 491, on the "Sources of American Colonial Law."

[4] Hall *v.* Campbell, Cowper, 212; Phillips *v.* Eyre, L. R. 6 Q. B. 1, 18; Chalmers' "Colonial Opinions," 215.

[5] *Supra*, pp. 14, 15.

[6] Canal Appraisers *v.* People, 17 Wend. 571, 617; Canal Comm'rs *v.* People, 5 Wend. 423, 446; cf. Wheaton *v.* Peters, 8 Peters, 591, 658, 659; Mayor, etc. *v.* Hart, 95 N. Y. 443, 450.

often differed from those of the older civilization.[1] Some of these differences have been mentioned.

The changes occasioned in the law relative to the socage tenure by the War of Independence and the establishment of a republican form of government will be next considered.

[1] Rensselaer Glass Factory *v.* Reid, 5 Cow. 587, 632; Morgan *v.* King, 30 Barb. 14 (reversed above on another point, 35 N. Y. 458); Wheaton *v.* Peters, 8 Peters, 591, 658, 659; Canal Appraisers *v.* People, 17 Wend. 571, 618, 622; Cutting *v.* Cutting, 86 N. Y. 522, 529.

CHAPTER IV.

THE EFFECTS OF "INDEPENDENCE."

THE outbreak of actual hostilities on April 19th, 1775, caused the government of New York to be carried on for a time by Revolutionary committees, congresses, and conventions.[1] In the southerly part of the province the military forces of the Crown administered a quasi-civil government until the definitive treaty of peace with England in 1783.[2] The "Resolves" of the purely Revolutionary governments were in the main of a temporary character, and but one of them relates to the socage tenure. It declared that "the quit-rents, formerly due to the king, are now due to the convention, or to such future government as may be hereafter established in the State."[3] The first republican Constitution of New York made these Resolves, when not repugnant to such Constitution, a part of the permanent and fundamental law of the new State.[4] When the Legislature had been organized, a statute was passed formally vesting the quit-rents in the people of the State, in whom the sovereignty and seigniory of all lands, tenements, and hereditaments were declared to be united.[5]

This Revolution at first created no great change in the private law of New York. After all successful revolutions public law is first remodelled and the private law appears to be unchanged; but nevertheless the change in the public law has sown seed which will sooner or later bear the fruit

[1] Butler's "Outlines of Const. Hist. of N. Y.," 48.

[2] In territory within the British lines probates of wills, intestate succession to estates, etc., were governed by the old law until this treaty took effect.

[3] Journ. Prov. Conv., I., 554.

[4] Sec. 35, Const. of 1777.

[5] Third session, c. 25, Laws of 1779, sec. 14; 1 J. & V. 44, sec. 14. This act is commented on in De Peyster *v.* Michael, 6 N. Y. 467, 503; but this case is not approved so far as its statement about the Statute of *Quia Emptores* is concerned, 19 N. Y. 68, 75.

of change.[1] With the cessation of hostilities, the Legislature turned its attention to the condition of the laws. In the year 1782 was passed the first of a series of acts affecting real property.[2] This act converted estates tail into estates in fee simple absolute;[3] it abolished primogeniture as a rule of descents, and made real estates partible inheritances, in which all the issue of equal degree shared alike, and in default of issue the estates went in equal shares *per stirpes* to the next of blood of the last owner. Until the passage of this act the canon of descents had been wholly regulated in New York by the English law.[4]

The English law of wills was, as we have seen, introduced in the year 1664 as one of the incidents or concomitants of the socage tenure,[5] although the Dutch *antenati* long preserved under the English *régime* their own customs concerning their inheritances.[6] In England, by the Statute of Frauds, 29 Car. II., c. 3, wills of lands were regulated. They were to be in writing, signed by the devisor or by his direction, and attested in his presence by three or four credible witnesses. This act seems to have been deemed to extend to the province,[7] and therefore the act 25 Geo. II., c. 6 (further regulating wills in those English plantations where the Statute of Frauds or some local equivalent extended), must also have been in force here[8] prior to Independence.

The private rights of those who adhered to the Revolutionary governments were very little, if at all, affected by the separation from the Crown. Their rights, titles, and estates in lands remained as before the war.[9] The State

[1] Ortolan's Int'd. to "The History of Roman Law."

[2] Session 6, c. 2, Laws of 1782; revised in 1786, 1 J. & V. 245. The act of 1782 was defective. See Jackson *ex dem. v.* Van Zandt, 12 Johns. 169.

[3] It did not provide for all cases. Cf. 1 J. & V. 245, and Medcef Eden's Case, 20 Johns. 483.

[4] Story on the Const., 77, and note, p. 78.

[5] *Supra*, p. 18.

[6] *Supra*, pp. 14, 18.

[7] *Supra*, p. 17. *Infra*, p. 78.

[8] For an account of the Probate Jurisdiction in the Province, see Introduction to Redfield's "Law and Practice of Surrogates' Courts."

[9] Kelly *v.* Harrison, 2 Johns. Cas. 29; Jackson *v.* Lunn, 3 Johns. Cas. 109,

Constitution of 1777 expressly declares that nothing therein shall be construed to affect any grants of lands within this State made by the authority of the said king (Geo. III.) or his predecessors.[1] At a later day the sheltering protection of the Federal Constitution precluded even the State itself from passing any law impairing the obligation of contracts.[2] The old royal patents to individuals, when involving property, came within the purview of this federal limitation of the political authority of the State,[3] which Chancellor Kent, indeed, deemed to extend even to political rights emanating from charters granted by the Crown;[4] but this extreme view ultimately proved quite erroneous.[5]

As the War of Independence was a civil war, out of which grew new sovereignties, many questions naturally arose concerning the status and the property rights of those who adhered to their former allegiance.[6] The dismemberment of the British Empire was a new event in the history of the English-speaking peoples, and their common law consequently offered only remote analogies[7] to the solution of such questions. Chancellor Kent, who lived so near to the struggle as to be almost an actor in it, has contributed to this branch of jurisprudence a chapter of high value,[8] which leaves nothing more to be said; but it is proper to point out that the adjudications cited by him were often the decisions of the courts of the victorious power. Now it has been well said that "war legislates," but such legislation is necessarily less enduring than that which is associated with an epoch of peace. The War of Independence is,

except that they might not be able to transmit them by descent to their English kindred. *Infra*, p. 76.

[1] Sec. 36; People *v.* Clarke, 9 N. Y. 349, 360; s.c. (below), 10 Barb. 120, 140.

[2] Sec. 10, Art 1.

[3] The doctrine of the Dartmouth College Case of course applies *a fortiori* to royal patents to individuals.

[4] Kent's "Charter of the City of N. Y.," note xlvi., p. 171.

East Hartford *v.* E. H. Bridge Co., 10 How. 511, 538; People *v.* Morris, 13 Wend. 325.

[5] Jackson *v.* White, 20 Johns. 313, 322; Appendix No. II., *infra*.

[7] Ch. Justice Lansing offers a remote one in the case of Normandy. Kelly *v.* Harrison, 2 Johns. Cas. 29.

[8] 2 Kent's Com., Lecture xxv.

however, now so remote as to make the questions indicated of less importance than formerly in the devolution of titles to real estate in New York; especially in view of the treaties which ultimately regulated many such questions. The peculiar dignity and justice of the American Revolution undoubtedly conferred on civil wars in general a certain juristic status.

The courts of this country gave to most of the subjects of the King of England residing in the colonies a reasonable time, dependent on the circumstances of each particular case, in which to elect whether to abide by their old allegiance, and depart out of the jurisdiction, or to remain with the new political society.[1] Many estates of disaffected persons were, however, confiscated and sales made by commissioners of forfeitures, who were appointed under the acts of attainder and forfeiture.[2] In such cases particular titles are derived directly from the acts of the Legislature. The rights and estates of the purchaser are also deduced from such acts.[3]

The act relative to the sales of the estates of the Earl of Dunmore, Oliver de Lancey, Esq., Mr. Justice Ludlow, Mr. Justice Jones, Peter Du Bois, Esq., and many other gentlemen of the province who had adhered to the king, and were specifically named in the act, was vested in the people of the State.[4] The powers of the commissioners of forfeitures to make sales arose by force of the statutes,[5] and new estates were limited by assurances executed by virtue of such statutory powers. Like all delegations, the powers needed to be strictly pursued.[6] The estates thus derived under these acts were not yet alodial, but were by provisions of the act of forfeiture held by the socage tenure of the people of the State in their political capacity, as successors

[1] Chapman's Case, 1 Dall. 53, 58; Jackson *v.* White, 20 Johns. 313, 322.

[2] C. 25, Laws of Third Session (1779); and of May 12th, 1784; 1 J. & V. 159.

[3] See "Sales of Property made by Isaac Stoutenburgh and Philip Van Cortlandt, Commissioners of Forfeitures," etc., compiled by John S. Ames, N. Y., May, 1885.

[4] C. 25, Laws of Third Session (1779).

[5] *Ibid.*, 1 J. & V. 159.

[6] *Infra*, c. VIII, on Powers.

to the subverted sovereignty and seigniory of the king. The acts expressly vested all rents, escheats, duties, and services by which estates were held, or which were annexed to them, in the new political corporation, and when such estates were sold or parceled out again by the State, they were presumed to be held in the same manner as estates not confiscated. But in 1787 the forfeited estates theretofore granted out by the State were made alodial by the "Act concerning Tenures." [1]

The rights of resident landholders were not greatly changed by independence of the Crown. The following are among the principles established by the courts of this country: 1. That as the division of an empire does not *per se* work a forfeiture of vested rights, the existing titles of British subjects acquired prior to the Revolution remained unimpaired after Independence.[2] 2. That independently of treaty such titles could not be transmitted by descent to those remaining in subjection to the kings of England, such persons being regarded as aliens, whether born here or abroad.[3] 3. That persons of full age, born or living in the province of New York, and remaining here after the outbreak of hostilities, *animo manendi*, were citizens of the new State.[4] Their remaining under the protection of the State was conclusive in law of an election to become its citizens, and if they indulged in treasonable practices, they were exposed to its penalties.[5] 4. A corollary of all this would appear to be, that if such persons so remaining were not attainted of treason (their status as citizens being fixed by law), they had capacity to transmit title by descent, however disaffected they might be to the State govern-

[1] *Infra*, p. 80; 2 J. & V. 67.

[2] Kelly *v.* Harrison, 2 Johns. Cas. 29; Jackson *v.* Lunn, 3 Johns. Cas. 109; Airhart *v.* Massieu, 98 U. S. 491.

[3] Orser *v.* Hoag, 3 Hill, 79; Brown *v.* Sprague, 5 Denio, 545; Munro *v.* Merchant, 28 N. Y. 9; Blight *v.* Rochester, 7 Wheaton, 535; Inglis *v.* Trustees Sailors' S. H., 3 Peters, 99.

[4] M'Ilvaine *v.* Coxe's Lessee, 2 Cranch, 280; 4 Cranch, 209; Peck *v.* Young, 26 Wend. 613; Kelly *v.* Harrison, 2 Johns. Cas. 30; Jackson *v.* White, 20 Johns. 313, 324; Munro *v.* Merchant, 28 N. Y. 9.

[5] See authorities last cited and Chapman's Case, 1 Dallas, 53; 1 J. & V. 39, c. 25.

ments.[1] 5. On the other hand, the capacity to inherit depends upon the allegiance at the moment of the descent cast.[2] 6. In case descent was thus cast on an infant, born and living out of the State, such infant might for some purposes, it seems, when *sui juris*, determine his citizenship by an election; but until the time of such election he retains the capacity of a citizen.[3] 7. A naturalization before office found bars the escheat of the State, at least where the alien has acquired by way of purchase.[4]

It was only after the definitive and permanent treaty of peace that a new era of legislation began in New York. Samuel Jones and Richard Varick were then appointed to collect and reduce into form for re-enactment all the acts of the Legislature of the province of New York, and such of the statutes of England and Great Britain as were supposed to extend to New York on April 19th, 1775.[5] In other words, they were directed to make a version explanatory of the thirty-fifth section of the Constitution of 1777, which had adopted such laws as the future laws of the new State. In this way the uncertainty about the statutes of England was authoritatively settled,[6] for after the acts of Parliament had been revised and made consistent with the new republican institutions, the Legislature by an act declared that none of the statutes of England or Great Britain should be considered as laws of this State.[7] The English statutes as thus revised and re-enacted were not deemed to be new laws in New York, but old laws re-enacted in a more suitable form, and continued in force here, pursuant to the thirty-fifth section of the Constitution of 1777.[8]

[1] M'Ilvaine *v.* Coxe's Lessee, 4 Cranch, 209.

[2] Orser *v.* Hoag, 3 Hill, 79; People *v.* Conklin, 2 Hill, 67; Peck *v.* Young, 26 Wend. 613, 625; Dawson *v.* Godfrey, 4 Cranch, 321; Blight *v.* Rochester, 7 Wheat. 535; Shanks *v.* Dupont, 3 Pet. 242.

[3] Ludlam *v.* Ludlam, 26 N. Y. 356; cf. Munro *v.* Merchant, 28 N. Y. 9; Shanks *v.* Dupont, 3 Pet. 242.

[4] Jackson *v.* Beach, 1 Johns. Cas. 399; People *v.* Conklin, 2 Hill, 67; Jackson *ex dem. v.* Green, 7 Wend. 333, 335.

[5] Laws of Ninth Session, c. 35 (1786).

[6] *Supra*, p. 54.

[7] C. 46, Laws of 1788; 2 J. & V. 282; Levy *v.* Levy, 6 Pet. 102, 110.

[8] Van Rensselaer *v.* Hayes, 19 N. Y. at p. 74; Corning *v.* McCullough, 1 N. Y. at p. 64; Jackson *v.* Schutz, 18 Johns. at p. 186; see reviser's note to

The revision of the laws by Jones and Varick[1] occupies an important place in the history of the statute law of New York; it determined what English statutes had extended to the province of New York, and were therefore adopted by the first Constitution of the State. The "Act concerning Dower"[2] and "An Act for Preventing Waste"[3] consolidated all the English statutes on these subjects prior to the end of the reign of King Edward VI.; "An Act concerning Tenures"[4] embraced the substance of the Statute *Quia Emptores Terrarum*, and of 12 Car. II., c. 24, reforming the socage tenure and abolishing feudalism. "An Act concerning Uses"[5] re-enacted the substance of the "Statute of Uses" (27 Hen. VIII., c. 10), and contained a clause of the Statute of Frauds (29 Car. II., c. 3) relative to executions against *cestuis que use*. "An Act for the Prevention of Frauds"[6] contains the substance of 13th and 27th Elizabeth against fraudulent conveyances and of 29 Car. II., c. 3, concerning the memoranda in writing requisite to the enforcement of certain conveyances and trusts of lands.[7] "An Act to Reduce the Laws concerning Wills into one Statute"[8] embodies the substance of the English Statute on Wills (32 Hen. VIII., c. 1 and c. 5, and 29 Car. II., c. 3); "An Act concerning Fines and Recoveries of Lands and Tenements"[9] and "An Act for Preventing and Avoiding Alienations by Tenants for Life and Recoveries by Collusion"[10] consolidated a great number of English statutes. A statute of distributions[11] embodied the earlier provincial law of 1697, which had been in its turn founded on the Statute of Charles II. (22 and 23 Car. II., c. 24), and the latter on the one hundred and eighteenth novel of Justinian.

Part II., c. 1, Tit. 1, Art. 1, R. S.; People *v.* Clarke, 9 N. Y. 349, 362; 4 Kent's Com. 494.

[1] "Laws of the State of New York, comprising the Constitution and the Acts of the Legislature since the Revolution, from the First to the Twelfth Session Inclusive." New York: Printed by Hugh Gaine, etc., MDCCLXXXIX.

[2] 2 J. & V. 4. [3] *Ibid.*, 7. [4] *Ibid.*, 67. [5] *Ibid.*, 68. [6] *Ibid.*, 88.

[7] The Statute of Frauds (29 Car. II.) being enacted after New York had a legislature of its own, was not in force in New York *stricti juris*; but we had here earlier laws requiring deeds to be in writing (*supra*, p. 16). After 1691 the English statute was probably regarded as extending here, for otherwise why was it re-enacted in Jones and Varick's Revision?

[8] 2 J. & V. 93. [9] *Ibid.*, 84. [10] *Ibid.*, 98. [11] *Ibid.*, 71.

But this revision did more than consolidate and adopt the English statutes. The rule of the common law in regard to estates in joint tenancy was so changed as to provide that in no case (except that of trustees or executors) should such estate in joint tenancy arise, unless the instrument creating it expressly declare that the same shall pass not in tenancy in common, but in joint tenancy.[1] The act of 1782 abolishing entails[2] was revised in a very thorough manner,[3] much extolled by jurists,[4] while the new law of descents (c. 2, Laws of 1782) was perpetuated,[5] but not so as to enable aliens to take by descent.[6]

The State Constitution having adopted as the future law of the State such parts of the common law of England, the statute law of England and Great Britain, and the acts of the Legislature of the colony (province) as together did form the law of the said province on April 19th, 1775,[7] it may readily be perceived from what has been said, that at the time of Jones and Varick's revision the law of New York relating to the socage tenure did not differ materially from the like branch of the law of England. This revision did not destroy such similarity; it was a redaction rather than a revision of the English statutes already in force. The statutes of the province of New York were left untouched in the main, until their final repeal in 1828-29.[8] The effect which the Revolution and Independence had on the socage tenure was embodied in the Statute of 1779;[9] the seigniory of all lands was declared to be in the people of the State in whom the political sovereignty then resided. This was, after all, only the substitution of a corporation aggregate as chief lord of the fee, instead of a corporation sole.[10] The

[1] 1 J. & V. 247.

[2] *Supra*, p. 73.

[3] 1 J. & V. 245.

[4] Medcef Eden's Case, 16 Johns. at p. 408.

[5] *Supra*, p. 73; 1 J. & V. 245; Lott *v.* Wykoff, 2 N. Y. 355.

[6] Jackson *v.* FitzSimmons, 10 Wend. 9; Luhrs *v.* Eimer, 80 N. Y. 171, 179.

[7] Sec. 35, Const. of 1777; Preface to 1 Johns. N. Y. Reports; Journeymen Cordwainers' Case; Yates' Select Cas. 111; Const. of 1822, Art. 7; Const. of 1846, Art. 1; Const. 1894-95, Art. I.

[8] C. 21, Laws of 1828-29.

[9] 1 J. & V. 44, sec. 14.

[10] It is said that none can hold except of a man's person; but Mr. Har-

incidents of socage tenure remained the same as before. The "Act concerning Tenures"[1] instituted no sensible reform in the incidents of lands already in tenure.[2] Nor could it do so with safety, for the thirty-sixth section of the Constitution of 1777 by implication[3] confirmed all the old Crown grants, and the remedies connected with them depended then on tenure. The "Act concerning Tenures" did, however, provide that the "tenure of all grants of any manors, lands, tenements, or hereditaments by any letters patent under the great seal of the State should be "allodial" and "not feudal."[4] This expression has been much criticised,[5] because "allodial" and "tenure" ordinarily denote contrasted conceptions,[6] and where there is an "alodium" there is no "tenure."[7]

The intention of the "Act concerning Tenures" is clear; it was, that the grantee of unpatented lands should hold the same in absolute property, divested of the feudal notion that there was a higher dominion over the land.[8] This use of the word alodial[9] adopted by Jones and Varick was not new. In the charter of "Freedoms and Exemptions" for the Dutch West India Company, under which the patroonships were founded in New Netherland, the lands within the fiefs of the patroons were "to remain alodial."[10] But this term was then sometimes employed to denote inheritable lands, and at other times to indicate lands opposed to beneficiary or feudal lands.[11] In the act of 1787,[12]

grave's note 117, Co. on Litt. 108*a*, is not applicable to tenures in a republic, where they survive only by force of a statute, which can declare an entirely new principle even in regard to feudal tenures. Besides there may be tenures of a corporation sole—*e.g.*, a bishop.

[1] 2 J. & V. 67.

[2] Cornell *v.* Lamb, 2 Cowen, 652.

[3] People *v.* Clarke, 10 Barb. 120, 140; affi'd, 11 Barb. 337; 9 N. Y. 349; Art. 7, Const. of 1822; Art. 1, Const. of 1846; Art. 1, Const. of 1894–95.

[4] 2 J. & V. 67.

[5] 3 R. S. 564, reviser's note; 2 Wendell's Bla. Com. 60.

[6] Hallam's "Middle Ages," I., 97.

[7] Compare the reform instituted by the Dutch in feudal tenures, whereby they held the lands within a fief, as if alodial; p. 8, *supra*.

[8] Cf. Freeman's "Norman Conquest," I., 58.

[9] Oftentimes "allodial," *e. g.* Const. 1846.

[10] Doc. rel. Col. Hist. N. Y., I., 120; *supra*, p. 8.

[11] Hallam's "Middle Ages," I., 150.

[12] 2 J. & V. 67.

the word "allodial" was employed as the antithesis of "tenure;" it meant "free of tenure."[1] Chancellor Kent doubted whether the creation of alodial property in land was a useful reform, as "socage lands" were then free from all feudal burdens. But the reform nevertheless led the way to the modern changes effected by the Revised Statutes, when all the lands in the State were made alodial,[2] and when the old learning concerning real property was swept away in whole or in part.

After the passage of the "Act concerning Tenures"[3] there were, until the Revised Statutes abrogated the distinction, two classes of lands in New York—the ancient socage lands derived from the grants by the Duke of York or from the English Crown and its predecessor in the sovereignty,[4] and the alodial lands patented under the great seal of the State of New York. The latter were free of quit-rents, fealty, relief, and escheats. It has been said that this distinction was preserved for the purpose of enabling the State to enforce the payment of the quit-rents, due formerly to the Crown,[5] and vested by several acts in the newly sovereign State.[6] But this is too narrow a statement, in view of the great number of old patents, manors, and lands, "farm" and "burgage," held by the ancient socage tenure. These patents were expressly saved by the first Constitution of the State.[7] The "Act concerning Tenures" (which re-enacted provisions of both the Statute *Quia Emptores* and 12 Car. II., c. 24, abolishing knight service and feudal burdens) contained a clause taken from the latter act, to the effect, "That this Act, or any Thing herein contained, shall not take away, nor be construed to take away or discharge, any Rents certain, or other Services incident or belonging to Tenure in common Socage, due or to grow

[1] Freeman's "Norman Conquest," I., 58.

[2] *Infra*, c. V. and c. VI.

[3] 2 J. & V 67.

[4] Lands granted by the Dutch government were changed so as to be held by the socage tenure; *supra*, pp. 14, 66; but compare People *v.* Clarke, 10 Barb. at p. 141.

[5] Jackson *v.* Schutz, 18 Johns. 180.

[6] *Supra*, pp. 72, 76.

[7] Const. of 1777, section 36.

due to the People of this State, or any mean Lord, or other private Person or the Fealty or Distresses incident thereunto."[1] The purport and intention of this saving clause were to express the constitutional rights of the lords of the manors, and the rights of the State as successor to the Crown, and consequently chief lord of the fee. Without some such reservation of fealty, which followed the reversion,[2] distresses for rent might have been taken away in some cases.[3]

In reviewing the "Act concerning Tenures," Chief Justice Spencer, in Jackson *v.* Schutz,[4] said, "Here are neither lords nor knights." The learned judge seems to have forgotten, that whether the manors of New York were legal manors or manors only by reputation, there were then by courtesy in New York a number of titular and legalized "lords of the manors," holding under Crown grants confirmed by the Constitution of 1777.[5] The saving clause of the "Act concerning Tenures" was therefore neither absurd nor needless to protect certain possible rights,[6] such as distresses, of this class of landed proprietors. The enactment of provisions contained in the Statute of *Quia Emptores Terrarum*, in our "Act concerning Tenures," was not because the English statute was not in force in the province, as is sometimes said,[7] but because it was so in force.[8]

[1] 2 J. & V. 68, section 5.

[2] Co. on Litt. 143*a*, 93*a*.

[3] Cornell *v.* Lamb, 2 Cowen, p. 656. It is hardly necessary to remind the reader that "fealty" was closely associated with the old common law remedies. This may be perceived from the fact that by the feudal law the "oath of fealty" might be taken to the seneschal or bailiff of the court, whereas "homage" could only be done to the seigneur himself. (Guizot's "History of Civilization," III., 155, 156, 158, 159.) Homage was taken away by the Statute 12 Car. II., c. 24, for when fiefs were hereditary in law homage was a useless ceremony, while fealty was left by the statute. (*Supra*, pp. 32, 38.)

[4] 18 Johns. 174, 178.

[5] The Revolutionary lawyers of New York knew quite as much of real property law as their students and successors (see Chan. Kent in Medcef Eden's Case, 16 Johns. 382, 411).

[6] The seigniorial rights do not, however, seem to have been asserted in Van Rensselaer *v.* Hayes, 19 N. Y. 68; *et supra*, pp. 32, 34.

[7] Van Rensselaer *v.* Smith, 27 Barb. at p. 148; De Peyster *v.* Michael, 6 N. Y. 467.

[8] Van Rensselaer *v.* Hayes, 19 N. Y. at p. 74.

The counsel who drew the "Act concerning Tenures" had a clearer conception of the task before them than Chief Justice Spencer seemed wholly to appreciate when he wrote the opinion in Jackson *v.* Schutz. Again, this act is in harmony with the preceding legislation of both the Revolutionary and the State governments, which expressly placed the abstraction or political corporation called the State in the place of the Crown in all its prior relations to the common law tenure of New York. In this manner the law concerning remedies and procedure were kept in actual accord with the changed political condition, while old forms so potent in judicial administration were preserved.[1]

The Constitution of 1777 was drawn by lawyers very familiar with the needs of the province, and the grants and property rights of the manor proprietors were consequently not disregarded by the terms of that instrument.[2] The protection thus accorded was much deprecated at the time by those most hostile to the institutions of England ;[3] but this hostility did not prevail: the ancient manors were repeatedly recognized by the Legislature of the State[4] as existing and continuing institutions, and their various acts adapting the former laws and statutes to the new government expressly saved the rents and services due to the manor proprietors. The "Act concerning Tenures" provides, "That all conveyances and Devices of any Manors . . . at any time heretofore made shall be expounded to be of such effect, as if the same manors . . . had been then held . . . in free and common socage only," and that the act shall not take away any rents certain or other services incident to that tenure and belonging to any "mean Lord."[5] This act was an auxiliary in the protection of the rents and services due to the titular lords of the manors, and was embodied in the revision because the English

[1] The change of the socage lands to alodial lands by the R. S. is discussed further in c. VI., *infra*.

[2] Const. of 1777, section 36.

[3] Article in N. Y. Daily Advertiser, March 4th, 1789, "Beware of Lawyers."

[4] C. 43 of Eleventh Session, 1788 ; 2 J. & V. 260 ; 2 K. & R. 4, 31.

[5] 2 J. & V. 67.

Statute 12 Car II., c. 24, and the Statute of *Quia Emptores* extended to the province.[1]

Whatever the motive animating the "Act concerning Tenures" may have been, it in effect recognizes the manors of the province, though not necessarily as "legal manors." It does not mention any seigniorial rights of the manor proprietors. It, therefore, leaves the seigniories themselves much as they stood before Independence, when they were never adjudicated legal.[2] It would have been hardly competent for the Legislature of a republican State to validate those seigniorial rights, which were at best of doubtful validity under the Crown itself. It was consequently as "reputed manors" only, or as mere territorial designations,[3] that the ancient manors of the province endured under a government inconsistent with personal privileges and seigniories. The State Legislature subsequently in several instances treated the "reputed manors" simply as political corporations, and as such for a time the freeholders of the manors became numerically prominent politically. When the courts of the State finally declared the patents valid as land grants, irrespective of the seigniories,[4] the political importance of the manors had relatively decayed. The abolition of primogeniture and the availability of fresher agricultural lands soon tended to reduce the manor lands to the level of other farms in the State. The successors of the lords of the manors forgot their seigniorial rights, if they ever existed, and preferred to place their rights of property on the secure basis of contract, and not on the doubtful basis of tenure. The Revised Statutes by its nominal and final destruction of tenures only despatched a dying institution. The State Legislature had meanwhile made the rights and the remedies on fee farm grants within the manors tolerably secure independently of the validity of the seigniories. There was no longer a motive to affirm the right to have a manor, and the seigniories effectually lapsed.

The revisers, Jones and Varick, next addressed themselves to the task of making the rules of law relating to alodial lands uniform with those well-known and venerable principles

[1] *Supra*, p. 35.
[2] *Supra*, c. II., p. 33; 2 J. & V. 260.
[3] 3 R. S. 6.
[4] People *v.* Van Rensselaer, 9 N. Y. 291.

of law then affecting socage lands. In the course of this task it must have been very apparent to the revisers that the reforms effected in the reign of King Charles II. in the socage tenure[1] had made socage lands, as Chancellor Kent believed, practically alodial, or absolute property in the highest sense of the term.[2] An act of the year 1787 provided that alodial lands should be a forfeit to the State, on a conviction for treason of the owner,[3] or by his conviction of a felony.[4] A later act provided for escheats of undevised lands in the event of the death of the last owner without right heirs.[5] In this manner and by judicial decision[6] the incidents of alodial lands were assimilated to those of socage lands, in so far as estates, devolution of title, and the seigniory of the State were concerned; but forfeitures by reason of the alienage of the owner of lands derived immediately from the State were not expressly provided for. The common law, but somewhat modified by several statutes,[7] regulated the forfeiture of socage lands for alienage until the year 1829,[8] and although on principle this part of the common law had little application to lands granted under the great seal of the State in pure and free alodium, it was applied to them, and consequently made grants to an alien inoperative.[9] The courts soon applied the Statute of Uses and the common law rules of estates in socage lands to alodial lands.[10]

Prior to the Constitution of 1822 the statute law of the State was again subjected to two authorized revisions. The first of these was made by Mr. Justice Kent and Mr. Justice Radcliff,[11] the second by Messrs. Van Ness and Woodworth.[12] The latter is now known as the Revised Laws of 1813, or

[1] *Supra*, pp. 32, 36, 38. [2] *Supra*, pp. 80, 81. [3] 2 J. & V. 57.
[4] 2 J. & V. 243. [5] 1 R. L. 379.
[6] In Jackson *v.* Davenport, 20 Johns. 537, we may see an interest in the new alodial lands decided by the books on tenures—*e.g.*, Co. on Litt. In Cornell *v.* Lamb, 2 Cow. 652, distresses were said to extend to alodial lands.
[7] C. 72, Laws of 1798; c. 49, Laws of 1805.
[8] Jackson *v.* Lunn, 3 Johns. Cas. 109.
[9] Bro. Abr. *tit.* "*Patentes*," 62; Finch L. 111; 2 Bla. Com. 347; but see Goodell *v.* Jackson, 20 Johns. 693, 707; Jackson *v.* Etz, 5 Cow. 314.
[10] Jackson *v.* Root, 18 Johns. 60; Jackson *v.* Davenport, 20 Johns. 537.
[11] Pursuant to c. 190, Laws of 1801.
[12] Pursuant to c. 150, Laws of 1811; R. L. of 1813, II., 555.

the New Revised Laws, and is cited "R. L." This revision virtually superseded the several prior revisions by Jones and Varick and by Kent and Radcliff. If we compare the English statutes relating to the socage tenure as contained in these three revisions, we shall find little change in the early text of Jones and Varick's edition. There were no other authorized revisions until the "Revised Statutes." [1]

From the year 1794 the law reports of New York are continuous. The regular chancery reports begin only with the year 1814.[2] The early reports enable us to ascertain in many instances how far and in what respect the land law of New York, as it stood before the Revised Statutes, differed from the contemporary law of England. Unlike Massachusetts, Maryland, and Virginia,[3] we have no reports of cases decided prior to the War of Independence, although some of the judges of this province were learned men, as is attested by their pupils, the great Revolutionary lawyers, at once statesmen, jurists, and soldiers. The adjudications of this period are fortunately not inaccessible in all cases to those who have sufficient interest in the origin of our legal institutions to follow this subject under difficulties to its fountain-head. Such opinions are often valuable expositions and applications of the law of the land.

This account of the changes effected in the law relating to land by the authority of the new State government ought to take note of one very powerful auxiliary. It is intended to refer to the laws regulating the record of deeds and other instruments concerning lands and estates in lands. The registration or record of deeds in public offices pursuant to recording acts is often esteemed a peculiarity of the law of this country. Such an inference requires to be modified. It is true that this practice is of early date in America, especially in New England, Virginia, and New York. Even the law of New Netherland was not silent on this point.[4] When the English came into the possession of

[1] *Infra*, c. V.

[2] Chancery appeals are of an earlier date in the "Cases in Error."

[3] 29 Amer. L. Rev. 148, 149.

[4] Laws and Ord. of New Neth. 114, 459; Van Cortlandt v. Tozer, 17 Wend. at p. 840 *et seq.*

the province in the year 1664, very stringent provisions,[1] taken out of the laws of the other colonies, were embodied in the "Duke's Laws," as the first New York book of English laws was called.[2] In the years 1683 and 1684 like laws were enacted by the first regular assemblies.[3] Whether these laws will account for the practice of recording deeds after the year 1691, in view of the Assembly's resolution of that year, is one of the unsettled questions.[4] In the year 1753 mortgages of lands were required to be registered in the clerk's office of the county where the land lay. When so registered, a mortgage took precedence of unregistered transfers;[5] but until the Revised Statutes there was no uniform or general act in New York requiring deeds to be recorded.[6] Before 1829 the acts were local and confined to particular counties,[7] called "recording counties." As early as 1704 Yorkshire, in England, had been made a recording county by an act of like purport,[8] and four years later the great county of Middlesex followed.[9] The decisions of the English courts on these acts were naturally very influential in the construction of the recording statutes of this country,[10] and our law on this head cannot be said, therefore, to be original, although it is now amplified beyond that of most other countries.

As the Statute of Enrolments (27 Hen. VIII., c. 16) did not extend to New York, bargains and sales of freeholds

[1] Duke's Laws, title "Conveyances, Deeds, and Writings."

[2] *Supra*, p. 13.

[3] "An act to p'vent frauds in conveyanceing of lands;" "A Bill to prevent Deceipt and fforgerye." *Supra*, pp. 17–19.

[4] *Supra*, pp. 21, 58.

[5] Van Schaack, 324; 2 L. & S. 19; 1 J. & V., Appendix VI. This act was followed by c. 45, 2 J. & V. 266, passed February 26th, 1788. Jackson *ex dem.* v. Dubois, 4 Johns. 216, 221, is not quite accurate therefore in its statement of fact.

[6] Jackson v. Chamberlain, 8 Wend. at p. 625.

[7] See appendix to first edition of 3 R. S., pp. 25–42. The first was in 1798, 3 Greenleaf, 408.

[8] 2 and 3 Anne, c. 4; see note to Sheppard's "Touchstone," 116, for English acts.

[9] 7 Anne, c. 20.

[10] Hurst v. Hurst, 2 Wash. Cir. Ct. 69, 74; Jackson v. Burgott, 10 Johns. 457; Dunham v. Dey, 15 Johns. 555.

were valid without enrolment ;[1] and, contrary to the law of England, a pecuniary consideration was thought sufficient here to support a covenant to stand seised.[2] But as there was always some doubt as to the necessity of an enrolment under the statutes of the province or otherwise, conveyances usually took the form of lease and release in New York, until after the revision of the English statutes by Jones and Varick in 1788 had set this matter quite at rest.[3] There were, however, in New York early examples of common law feoffments with livery of seisin.[4] After the year 1788 deeds of bargain and sale took the place of lease and release as the favorite mode of conveying real property.[5] Subsequent to the establishment of the State government the courts of New York finally adopted the rule[6] (thought then to have prevailed in the province), that mortgagees of lands had not ordinarily the legal title thereto, but only a right *in re*, as security,[7] enforceable in equity by a sale of the mortgaged premises.[8] Before Independence the provincial practice of foreclosing mortgages was by a sale under a power of sale or else a strict foreclosure, as in England.[9] Other differences, some of them radical, began to be manifest and to occasion wide departures from the law of England. In Fenton *v.* Reed,[10] for example, it was held, in the year 1809, that a contract of marriage *per verba de præsenti* is as valid as if made *in facie ecclesiæ*. Dower and the common-law rights of the spouses were, of course, affected by this unfortunate decision.

[1] *Supra*, pp. 56, 57, note.

[2] Jackson *ex dem. v.* Dunsbagh, 1 Johns. Cas. 91 ; but see Jackson *v.* Sebring, 16 Johns. 515 ; cf. Lossee *v.* Ellis, 13 Hun, 635, 638 ; Schott *v.* Burton, 13 Barb. 173, 182.

[3] Jackson *ex dem. v.* Myers, 3 Johns. 388.

[4] *Infra*, c. IX.

[5] Jackson *ex dem. v.* Wood, 12 Johns. 73.

[6] Waters *v.* Stewart, 1 Caine's Cas. in Error, 47.

[7] Jackson *ex dem. v.* Willard, 4 Johns. 41.

[8] Lansing *v.* Goelet, 9 Cow. 346, 370 ; *infra*, c. VI.

[9] See note to Lansing *v.* Goelet ; cf. Slee *v.* Manhattan Co., 1 Pai. at p. 68.

[10] 4 Johns. 52. It has been thought by some lawyers that this case was the result of a misconception of the law of England. It neither examined nor stated the law in the province of New York ; for all marriages were ceremonial under the royal government. Nor did it state the law of England with accuracy. It is nevertheless now a part of our jurisprudence.

The decisions of the courts of England made prior to the Revolution formed an important part of the common law adopted by the Constitution of 1777, and in the absence of any conclusive local authority to the contrary, are held to have constituted the law of the province of New York;[1] but there were, as we have seen,[2] many departures from the precise doctrines of the English cases. For example, tenants in common might here, contrary to the English practice, make a joint demise, and thus maintain in effect a joint action of ejectment.[3] So actual possession, *pedis possessio*, of wild lands was not necessary to the completion of a tenancy by the curtesy.[4] In Cornell *v.* Lamb,[5] it was intimated that fealty was no longer necessary to support the right of distraint—a doctrine then probably limited to the owners and tenants of the alodial lands, or those lands then granted and held by a patent issued under the great seal of the State.[6]

What was true of the common law courts was also true of the courts of equity, where the chancellors, especially Kent, adhered very closely to the English precedents,[7] deprecating the meagreness of the available adjudications in the Court of Chancery of the province of New York,[8] notwithstanding the antiquity of the domestic tribunal.[9] The latter was founded in the year 1683,[10] or before the more influential chancellors of England had ascended the "throne of equity."[11] Chancellors Livingston and Lansing, however, attached much importance to the practice of the Court of Chancery of the province.[12]

[1] Jackson *ex dem. v.* De Lancey, 13 Johns. 537, 556; *infra*, p. 105.

[2] *Supra*, c. III.

[3] Hasbrouck *v.* Bunce, 62 N. Y. 475, 480.

[4] Jackson *v.* Sellick, 8 Johns. 262; Jackson *v.* Gilchrist, 15 Johns. 87, 118.

[5] 2 Cow. 652.

[6] *Supra*, p. 80.

[7] Manning *v.* Manning, 1 Johns. Ch. 527.

[8] Cumberland *v.* Codrington, 3 Johns. Ch. 229, 262.

[9] Adverted to in Hood *v.* Inman, 4 Johns. Ch. 437.

[10] Intro. to Hoffman's N. Y. Chancery Practice.

[11] *Supra*, p. 51.

[12] See, for example, note to Lansing *v.* Goelet, 9 Cowen, 346. Mr. Johnson's remark, that very little business was done before 1778 in the New York Court of Chancery, often conveys a very misleading notion of the importance of the

From the instances mentioned, we perceive that even prior to the Revised Statutes there was a visible tendency to subvert those rules of law which took their rise in the days of feudalism, or which were independent of the law of contract. The Revised Statutes soon accomplished even greater changes.

early existence of an equity jurisdiction in legal administration in New York. Pref. to Johns. Ch. Pr., I.; cf. Slee *v.* Manhattan Co., 1 Pai. 48, 68, and note 26, Grolier Bradford's N. Y. Laws of 1694, p. cxxxii, on right of the crown to erect courts of equity by ordinance.

CHAPTER V.

THE REVISED STATUTES.

It is not proposed to consider more than the purely external phases of the Revised Statutes[1] relating to real property. It was undoubtedly the opinion of many competent persons that the Revised Statutes of New York marked an epoch in the law of English-speaking peoples, in so far as this work related to lands held by the socage tenure ;[2] and after the Statute 12 Car. II., c. 24,[3] we know that that tenure had in fact superseded all other lay frank tenures.[4] Tenure by frankalmoign,[5] or religious services, never existed here. It was not that this revision was so novel in character, but that it was so comprehensive, dealing, as it did, with the most complicated problems of the common law. At the same time it conserved much that was good in the ancient jurisprudence, while literally brushing aside nearly all that was purely scholastic subtlety, very good in its day for unfettering inheritances, but in the year 1827, in New York, archaic.

Although the Revised Statutes remain the basis of the law of real property in New York, particular provisions have since been subjected to amendments and alterations, which it is beyond the scope of this essay systematically to pursue. The later annotated editions of the Revised Statutes either contain or indicate such amendments with sufficient accuracy, and they are in the main very fa-

[1] The references to the pagination of the Revised Statutes are here made to the original edition only, in conformity with the almost uniform custom of the higher courts of the State.

[2] They were substantially adopted in Michigan, Minnesota, and Wisconsin, while particular provisions have been enacted in many other States.

[3] Passed in the year 1660, and taking effect as from 1645.

[4] Since that statute no lay frank tenure could be created, even by the Crown, without the assent of Parliament. Chetwode Bart. *v.* Crew, Willes, 614.

[5] Co. on Litt. 93*b*.

miliar to the profession of the law. To consider them here in detail would, as it is thought, swell the compass of this outline beyond reasonable proportions, and obscure other phases of the subject.

After the second Constitution, when revision was contemplated, the revisers evinced great confidence in the effect of an arrangement by chapters. This they thought would reduce the statutes then in force to half their extent; it would render them so concise, simple, and perspicuous as to be intelligible not only to professional men, but to persons of every capacity; it would relieve the statutes from obscurities, lead to easy references by proper indexes, and greatly facilitate the acquisition of the law as a science. Lastly, it would supersede the necessity of all future revisions, and prepare the way for a scientific codification of the law.[1] This explicit announcement demonstrates that the Revised Statutes are more than their name implies—a revision of statutes only.

The third decade of the present century was favorable to a reform of the law relating to land. The subject was then under discussion in England. A barrister, Mr. Humphreys, had lately published a scheme for reforming the socage tenure,[2] which soon received the approbation of the commission appointed by King George IV.,[3] to report the state of the law of England relating to real property.[4] Mr. Humphreys' outline received the careful consideration of the revisers appointed by the State of New York in the years 1825–27.[5] The New York revisers remodelled the entire statute law of New York; but they did not stop there, as in numerous instances they reduced the rules of the common law to written texts, inserting them in their appropriate place.[6] Their achievement, interpreted by the courts,

[1] Mr. Butler and Mr. Duer to the Legislature.

[2] "Observations on the State, etc., of the English Laws of Real Property," London, 1827.

[3] 9 Geo. IV.

[4] This committee made four reports. The first was ordered printed May 20th, 1829.

[5] C. 336, L. of 1824; c. 324, L. of 1825; c. 242, L. of 1827; c. 331, L. of 1828.

[6] Preface to the R. S.

furnishes the present learning on the subject of real property in the State of New York.

Prior to the Revised Statutes the actual condition of the law of real property in New York was favorable to the work of revision. The involved system of conveyancing, and the complex modifications of real property rights, employed in England after the reign of Charles II., and, indeed, after the Statute of Uses (27 Hen. VIII.), were then little known in New York. Limitations in trust were infrequent, conveyances of lands being usually made directly to the persons intended to have the fruits of the estate. Very few instances involving powers deriving their force from the Statute of Uses[1] are reported in the early New York books. The powers there met with are generally mere common-law authorities connected with wills, where the estate passed by force of the will. Nor was anything known here in practice of the species of interests in land, called "attendant terms" or "terms to protect the inheritance,"[2] which after the reign of Queen Elizabeth flourished in England, as if seemingly to compensate the lawyer class for those equitable uses destroyed by the Statute of Uses. Therefore it is apparent that only the simpler phases of the English law of real property had been adopted by our conveyancers, by the year 1830, and that much of the learning of the great property lawyers of England had not then been applied to the creation or to the devolution of estates in New York. But as the first Constitution of the State had made the English law the ultimate rule for all cases not otherwise determined, the chance of acquiring the various scholastic subtleties, grafted on the common law of England, would increase with the growth of fortunes in New York. Now these subtleties were much deprecated even in England, where the personal and class interests of the Bar specially favored the security and the perpetuation of landed estates, still the real basis of the political system of England.

It was only after the New York State Constitution of

[1] Always in force in New York under the English, and re-enacted in the revision by Jones & Varick, 2 J. & V. 68; *supra*, p. 78.

[2] 4 Kent Com. 90.

1822–23 that the spirit of democracy was sufficiently strong to break with legal traditions, and triumph over the forces of the old common law, at least in so far as the old socage tenure was concerned; and the more valuable estates in New York were still of this tenure, although by a curious inversion the lord paramount had then become the people of the State in their political capacity, or more literally, the abstraction called the State served as lord paramount.

The New York revisers found two plans open to them: First, that suggested by Mr. Humphreys, a reform of the socage tenure (the law of which had extended by analogy to the alodial lands); or, second, to make all lands alodial, abolish every vestige of feudal tenures, and apply to the future acquisition and transmission of the alodial lands certain rules selected from the best of the old ones bearing on the socage tenure. The revisers chose the latter course, although the abolition of the socage tenure never quite met with the approval of Chancellor Kent.[1] In some instances they entirely reformed the antecedent law, and on the whole the changes have been approved and have led to a system much simpler than the one superseded by the Revised Statutes. The entire statute law relating to real property is now displayed in a few chapters, but the use of an ancient and technical terminology makes some knowledge of the old system indispensable for conveyancers.

Prior to the Revised Statutes the New York law relative to land was to be found either scattered through the case law of England (modified by the vague canon or hypothesis that such law should be suited to new political and social conditions, and supplemented by the reports of our own territorial courts), or else in the great English statutes incorporated generally in Jones and Varick's revision of 1787–89.[2] The latter had been modified somewhat by later legislation. All this mass of law related to the socage tenure. If we add to this that lands granted by the State were already alodial,[3] but that the laws governing them were in course of constant assimilation to socage lands by methods of attraction and analogy, it is quite easy to perceive why any revision of the law by statutory methods

[1] 4 Com. 3. [2] *Supra*, p. 77. [3] 2 J. & V. 67, 68, sec. 5.

was considered desirable after the second State Constitution.

As already stated, the condition of the law of real property was not, before the Revised Statutes, a satisfactory one. The statutes abolishing entails[1] had accomplished little, for entails might be freely broken and lands rendered alienable by the tenant of the freehold suffering a fine or common recovery, thus barring the entail, reversion, or remainder, and turning the entailed estate into one in fee simple. Such was a common practice in New York, and one of the first law books published in this State was entitled "The Theory and Practice of Fines."[2] The abolition of entails accomplished little, because land might be rendered inalienable for a longer period by a springing use or an executory devise than by an entail. Many of the older common lawyers did not, however, favor the statutes abolishing entails, and we find this prejudice reflected in those decisions where the courts made what was regarded at the time as a distinct departure from the common law, holding that certain words, before creating an estate tail, did not now create an estate tail which the statute converted into a fee simple absolute, but created a valid executory devise.[3] These decisions were not wholly satisfactory; it was said that if after every reform there was to be a departure from what was formerly regarded as settled law, estates would be rendered less easily alienable than before the statute abolishing entails. In cases involving perpetuities the law always regards possibilities, not probabilities.[4] "Executory devises" as a mode of limiting future estates possessed through judicial favor some advantages over shifting uses introduced in deeds, but as the former were confined to wills, they were of circumscribed utility.

Subsequent to the statutes abolishing entails,[5] as before those statutes, there were several technical modes by which socage lands in New York might before the Revised Stat-

[1] *Supra*, pp. 73, 79.

[2] A.D. 1794.

[3] Fosdick *v.* Cornell, 1 Johns. 440; Jackson *v.* Blanshan, 3 Johns. 292; Jackson *v.* Staats, 11 Johns. 337; Anderson *v.* Jackson, 16 Johns. 382.

[4] Amory *v.* Lord, 9 N. Y. 403, 415; Schettler *v.* Smith, 41 N. Y. 328.

[5] *Supra*, pp. 73, 79.

utes be rendered inalienable within the limits then established against perpetuities. The tenant in fee simple might carve the estate into particles, and by vesting the ultimate title only on certain contingencies after the termination of a short precedent estate, might render it inalienable for a considerable space of time. This class of limitations we know as contingent remainders. By the device of trustees to support contingent remainders, such remainders were put beyond peril, as they then could not be barred or defeated by a fine or recovery. Future estates by way of contingent remainders might be created by any mode of conveying title to lands. However, no limitation which might be regarded as a remainder could be construed as a springing or shifting use. Uses, called secondary, springing, shifting, or generically future uses, were limitations by which estates could be made to take effect *in futuro*, and they owed their operation to judicial construction of the Statute of Uses (27 Hen. VIII., c. 10).

Thus there were prior to the Revised Statutes three classes of limitations creating legal estates to take effect *in futuro*, and naturally suspending the power of alienation to some extent—remainders, springing and secondary uses, and executory devises. Each had its associated rules of construction, and these rules were not always consistent with each other or in accord with any great political principle. They were the arbitrary outcome of historic struggles over perpetuities. Thus the same limitation might be valid if contained in one instrument and invalid if contained in another.[1] The validity often depended on the character of the writing. No contingent remainder in a freehold could be limited on a term of years,[2] nor could a fee be limited on a fee except by a will or by a shifting or springing use;[3] no remainder could be limited after a lease at will.[4] An estate "to 'A,' remainder to his heirs," gave a fee to "A," and the heirs took nothing.[5] It was the aim of the revisers of the statutes to abolish all such technical rules and distinctions having no relation to the essential

[1] Taylor *v.* Biddall, 2 Mod. 289; 2 Bla. Com. 173.
[2] Chudleigh's case, 1 Rep. 130.
[3] Walter *v.* Drew, Comyn, 372.
[4] 8 Rep. 75.
[5] Shelley's Case, 1 Rep. 104.

nature of property and resting solely upon feudal reasons. The time was extremely opportune, for, as already stated, the niceties of the law of conveyancing, as practised in England by the great property lawyers, had hardly secured a foothold in New York. Had it been otherwise, the revisers' task would have met with much more opposition from people of property.

The scheme of this revision has been fully indicated by the revisers themselves in their "Notes" and in their Reports to the Legislature, which are often treated as a complementary key to the revision itself. In this instance the notes or construction of the revisers ought to receive great weight, for it is demonstrable that the confidence of the Legislature in the revisers was so great as to induce that body to adopt this part of the revisers' work substantially without change. It is true that it was said by Lord Campbell, in substance, that the author of an act is little qualified to construe it, as he considers more what he privately intended than the meaning he expressed.[1] But it is to be observed, in this connection, that a contrary opinion has been held in the case of Sir Edward Sugden's comments on his "Act in Relation to Trustees,"[2] and our revisers' comments seem entitled to a respect quite equal to that accorded to even those of Sir Edward Sugden.

It is impossible within the limits prescribed for this essay to discuss the content, or more than the form, of the Revised Statutes relating to real property.[3] Blackstone's well-known classification, not always acquiesced in by his critics, was very powerful with the revisers, though not conclusive. For example, Blackstone chose the term "real property" as the general title of the second book of the Commentaries on the Laws of England, and as embracing "estates for years" as well as "lands," tenements, and hereditaments, which were terms of science in the common law.[4] The revisers did practically the same.[5] They, how-

[1] Lord Campbell's "Life of Lord Nottingham," Vol. IV., Chancellor Series, p. 228.

[2] Lewin on Trusts, 473 (1st edition).

[3] Chapters 1, 2, and 3 of Part II. of the Revised Statutes.

[4] Co. on Litt. 1*a* to 6*a*; Mott *v.* Palmer, 1 N. Y. 564, 569.

[5] 1 R. S. 717; caption of Part II.

ever, defined "real estate" and "lands" as co-extensive with lands, tenements, and hereditaments,[1] meaning at common law. This gave the term "real estate" in parts of the Revised Statutes a more extended significance than it had at common law, for it here embraced "terms of years."[2] Thus the Revised Statutes have to some extent deviated from the stricter common law terminology, but wherever this is done the revisers have with precision indicated the deviation. It is most important to notice the extent of such deviation, for otherwise it is impossible to ascertain the change introduced in the law of real property by the Revised Statutes. This is obviously true of that part of the statute which abolishes feudal tenures, for the alodial lands continue curiously like the former socage lands in many of their legal incidents.

While the Revised Statutes made all lands alodial[3] (subject to an escheat for want of heirs of the last owner[4]), the people of the State in their political capacity were declared to possess the original and ultimate property to all lands within the State.[5] In these sections we may readily detect the influence of the Statute of 1787,[6] first making lands alodial, but which, after all, only stated the effect of the War of Independence in subverting the ancient sovereignty and transferring it to the people in their political capacity —*i.e.*, the State. The revisers again expressed this fact. The Revised Statutes, like the Statute of 1787, saved all rents or services theretofore or thereafter reserved.[7] This saving clause referred to the former or socage services only.[8] In this way the lands of New York, although declared alodial, preserved many features of the socage tenure, a

[1] 1 R. S. 750, sec. 10; cf. 1 R. S. 754, sec. 27.

[2] Merry *v.* Hallett, 2 Cow. 497; Co. on Litt., 19, 20; cf. Mayor, etc., New York *v.* Mabie, 13 N. Y. 151, 158.

[3] 1 R. S. 718, sec. 3. This is now embodied in the Constitution of 1894–95, Art. 1.

[4] Goodrich *v.* Russel, 42 N. Y. 177; People *v.* Fulton Fire Ins. Co., 25 Wend. 205, 219.

[5] 1 R. S. 718, sec. 1.

[6] 2 J. & V. 68; 1 R. L. 380; Van Rensselaer *v.* Smith, 27 Barb. 104, 149; *supra*, pp. 80, 84.

[7] 1 R. S. 718, sec. 4.

[8] Van Rensselaer *v.* Smith, 27 Barb. 104, 149.

fact which the revisers emphasize, for in the first article of the first chapter,[1] they not only preserve the rights and powers of guardian in socage, but they entitle the article "Of the Tenure of Real Property." Now the words "tenure" and "alodial" are ordinarily antithetical, denoting contrasted conceptions.[2] Tenure denotes the specific feudal relation subsisting between the lord and the tenant.[3] There was ordinarily no tenure where lands were alodial. But this is not always true. The term alodium had been used in England to designate an inheritable feud.[4]

The revisers with great precision explain in the statute itself that by "alodial lands" are meant those which subject only to escheats, vest the entire and absolute property in the owners.[5] The statute thus invested the land owners with the most extensive proprietary rights known to the jurisprudence and polity of civilized States. The revisers' conception of alodial property concurs with a subsequent one by a great historical scholar, Professor Freeman, in his work on the Norman Conquest: "It is an estate great or small which the owner does not hold either of the king or of any other lord, but in regard to which he knows no superior but God and the law."[6] While somewhat rhetorical for the purposes of concrete law, such definition is both precise and technical.

The revisers declared "all feudal tenures with all their incidents abolished,"[7] thus repeating the word "all" within a few syllables, as if to render it more emphatic. But rents and services certain are expressly saved as future incidents of landed proprietorship, and their continuance assured by the next clause of the statute.[8] Now this saving clause was as old as the Statute 12 Car. II., c. 24, which had effected substantially the same things in the year 1660;[9] so that Chancellor Kent's objection—that to declare

[1] 1 R. S. 718.

[2] *Supra*, pp. 80, 81.

[3] Att'y Gen'l Ontario *v.* Mercer, 8 App. Cases at p. 72.

[4] Freeman's "Norman Conquest," IV., p. 38, notes; c. 1, p. 8, *supra*, as to New Netherland fiefs.

[5] 1 R. S. 718, sec. 3.

[6] Freeman's "Norman Conquest," I. 58, 63, 64.

[7] 1 R. S. 718, sec. 3. [8] *Ibid.*, sec. 4. [9] *Supra*, p. 27.

socage lands of the nineteenth century alodial was a change without substance[1]—seems to be not devoid of foundation.

The revisers, however, had a reason for the change other than the fact that part of the lands in the State were already alodial. They desired to destroy all feudal conceptions of real property, and to invest private owners with all the presumptions in favor of their proprietary interest. This was a most important step in the construction of the Revised Statutes, for it destroyed analogies of the common law and made the statute to some extent the key of its own interpretation. Again, alodial lands should be in theory more secure from an exercise of even the right of eminent domain than lands held of the people of the State on the socage tenure, for a tenure ordinarily imports a personal relation in subordination to some superior right. When the political superior became the people the lands were practically alodial, and a land owner here in reality held of himself as long as the socage tenure lasted, or until the Revised Statutes swept away this historical fiction by declaring all lands alodial,[2] and by abolishing all the incidents of feudal tenures. At a subsequent day the framers of the Constitution of 1846 insisted (notwithstanding the objection of many lawyers that it was unnecessary) upon having a like provision inserted in that instrument again abolishing feudal tenures, but again saving pre-existing rents and services.[3] Now, strictly feudal or military tenures had never existed in New York, such tenures having been prohibited in England prior to the English occupation of 1664.[4] The Constitution of 1846[5] therefore simply repeats a provision of the Revised Statutes declaring all lands alodial, and this provision appears again in the present Constitution.[6] It would have been quite sufficient for the Constitutions to have declared all lands alodial.

The revisers preserved another incident of socage tenure. The prerogative of escheats *propter defectum sanguinis*, which after Independence had belonged to the people, as

[1] 4 Kent's Com. 3.
[2] 1 R. S. 718, sec. 3.
[3] Const. of 1846, Art. 1, sec. 12; Const. 1894–95, Art. 1, sec. 11.
[4] *Supra*, pp. 12, 27, 36, 38.
[5] Art. 1, section 13.
[6] Const. of 1894–95, Art. 1, sections 11 and 12.

successor to the Crown, is by the Revised Statutes properly declared to be in the people of the State.[1] By the common law the king took escheated lands free of all trusts.[2] The Revised Statutes changed this rule, making them subject to all incumbrances, charges, rents, and services to which they would have been subject had they descended; thus the State became a trustee, and its Court of Chancery was empowered to direct the attorney-general to convey them to the persons equitably entitled.[3] The Revised Statutes preserved to the State forfeitures of lands alienated to aliens, but such forfeitures are referred to by the generic term "escheats," and are noticed again.[4] Escheats *propter delictum tenentis* were preserved in a single case, treason,[5] but are now for life only.[6] In 1846 the remodellers of the Constitution inserted in that instrument the provision saving escheats to the people of the State in all cases where an alodial proprietor died without heirs,[7] and this same provision appears in the present Constitution.[8]

The right of eminent domain was unaffected by the Revised Statutes. This right is often traced to the declaration of the Revised Statutes that the people possess the original and ultimate property in all the lands of the State,[9] and it is said that they may therefore resume the ownership and possession of all such property;[10] but such right, no doubt, exists as an attribute of sovereignty and independently of the Revised Statutes and of their constitutional paraphrase in 1846[11] and 1894.[12] The intimation in Smith *v.* City of Rochester, that such right is in any way an attribute of tenure, is probably a partial statement, and true only in the sense that it is true that all private property is theoretically held by permission of organized governments.[13]

[1] 1 R. S. 718, sec. 1.
[2] Burgess *v.* Wheate, 1 W. Bl. 123; 1 Eden, 177.
[3] 1 R. S. 718, sec. 2; Johnston *v.* Spicer, 107 N. Y. 185.
[4] Appendix No. II.
[5] 1 R. S. 284.
[6] Penal Code, sec. 710; Code Crim. Pro., sec. 819.
[7] Const. of 1846, Art. 1, section 11.
[8] Const. of 1894–95, Art. 1, section 10.
[9] 1 R. S. 718, sec. 1.
[10] Smith *v.* City of Rochester, 92 N. Y. 463, 477.
[11] Art. 1, sec. 11.
[12] Art. 1, sec. 10.
[13] People *v.* Trinity Church, 22 N.Y. 44.

The major limitations on the doctrine of eminent domain are still found in the common law relating to the socage tenure.

Notwithstanding the abolition of the socage tenure, the revisers did not see fit to create a new body of curators, or guardians, of lands falling to infant proprietors. They retained the well-known rights, powers, and duties of a guardian in socage ;[1] but they changed the former rule, that the guardianship shall belong in no case to the next of kin to whom the inheritance could by any possibility descend. Lord Chancellor Macclesfield had long before disapproved of the old rule. It was founded on a very different condition of society, and thus it was unfitted for a kindlier and better age. This retention of the rights, powers, and duties of guardians in socage of alodial lands is curious in some aspects, but the revisers made no change for the love of change. They even sacrificed consistency to utility, and thus their work has been retained intact in all subsequent revisions or proposed codifications.

The revisers retained, perhaps for reasons of State, the old disabilities of aliens to hold lands,[2] although the legal reasons for the disabilities were to be found rather in the old common law[3] than in the polity of a sparsely settled State. This deference to old institutions was not because the revisers had any doubt of the extent of the power of the Legislature to alter the common law, for it was expressly given.[4] Nor had they any hesitancy in going to the root of evils. In fact, their proposals to the legislature announced more radical changes in the common law than any codification or revision has ever before or since proposed ; but theirs were very wise changes.

Notwithstanding the extensive changes made in the former law of land by the Revised Statutes, the terminology there employed is for the most part that known to the common law. The language of the statutes, even where it deviates from that of ancient statutes, is precisely such as we might expect to be used by persons trained in the science of the common law ; consequently the key to the con-

[1] 1 R. S. 718, section 5.
[2] 1 R. S. 719.
[3] Appendix No. II. this volume.
[4] Const. of 1822-23, Art. 7, sec. 13.

struction of the Revised Statutes can be found only in the common law, unless the statutes expressly direct that the construction shall be independent of it. Occasionally, as stated before, a technical term is used in a new sense or in one more restricted or extended than formerly, but the revisers in such cases usually mark the deviation by a definition of the term. Thus the scheme of the statute is carefully worked out by the revisers, and creates no difficulty in practice to those familiar with the "new learning;" but in reading the statute the statutory definitions must be first absolutely acquired, or the key to the construction may be wholly lost.[1] At times the deviation from the old meaning of a common-law term is very slight, yet important to observe.[2] Thus "chattels real" and "chattel interests" are contradistinguished.[3] Prior to the Revised Statutes an estate for years was indifferently either a "chattel real" or a "chattel interest." So a "fee simple" and a "fee simple absolute" formerly denoted the same thing.[4] The revisers apparently have made it otherwise.[5]

The portion of the Revised Statutes which relates to lands, and is to some extent discussed in these pages, was passed December 10th, 1828, and took effect on January 1st, 1830.[6] By the law of December 10th, 1828, known as the "General Repealing Act," it was provided that "no statute passed by the government of the late colony of New York" should be "considered as a law of this State."[7] This was the first formal repeal of the acts of the Provincial Assembly.[8] Its legal effect has not been fully discussed. The repealing clause contained a singular inaccuracy in respect of the title of the former government.[9] So the word "statute" in this clause but imperfectly describes both acts of

[1] Griffin *v.* Shepard, 124 N. Y. 70.

[2] *e. g.* Cruikshank *v.* Home for the Friendless, 113 N. Y. 337, 353, 354.

[3] 1 R. S. 722, section 5.

[4] Jackson *v.* Van Zandt, 12 Johns. 169, 177; Lott *v.* Wykoff, 1 Barb. 575; affirmed, 2 Comst. 355.

[5] 1 R. S. 722, section 2.

[6] C. 20, Laws of 1828-29, p. 19.

[7] C. 21, Laws of 1828-29, section 4.

[8] Few of these acts made any essential changes in the socage tenure. The reason has been considered; *supra*, p. 58.

[9] It was entitled in all official documents "The Province of New York."

Assembly and ordinances of the Crown and its representatives, which were equally sources of law in the provincial epoch.

If the present law of real estate is not to be found in the Revised Statutes or in the amendatory and supplementary acts since passed, it depends by constitutional limitation on the common law of the State.[1] A comparison of the various constitutional provisions determining the fundamental law of the State, including the common law, discloses slight variations of phrase to meet the successive changes in the condition or form of the law. The Constitution of 1777 adopts expressly (but with a proviso[2]) such parts of the common and the statute law of England, and of the statute law of the "colony of New York," as together did form the law of the said colony on April 19th, 1775. The Constitution of 1822–23 omits any reference to the statute laws of England, such laws having been meanwhile repealed and their equivalents re-enacted in the year 1788.[3] It is also more general in its proviso, or in that clause which abrogates such parts of the former common law as are repugnant to the republican constitution. The constitution of 1846 omits all reference to the acts of the Legislature of the former province or "colony of New York," such acts having been repealed in the year 1828.[4] The present Constitution is in the same language as that of 1846. It, however, omits the part of the section which contemplated codification of the entire body of the fundamental law.

This fourfold establishment of the former common law of the province of New York as the fundamental law of the State of course involves that part of the common law of England which had been recognized as suitable to the province of New York.[5] By a singular necessity of any jurisprudence derived from a parent State, the courts of the present day are still determining what parts of such English common law were suited to the social and the

[1] Const. of 1894–95, Art. 1, sec. 16; Const. of 1846, Art. 1, section 17; Const. of 1822–23, Art. 7, section 13; Const. of 1777, section 35.

[2] The proviso in substance excepts those parts of the common law which related to the State Church of England or to the King in his political capacity.

[3] *Supra*, p. 77. [4] *Supra*, p. 103. [5] *Supra*, p. 23.

political conditions of the province of New York, and are therefore made part of the law of to-day.[1] The ingenious inquirer must often find some food for reflection in those constitutional provisions which thus translate the common law of England with fundamental reservations into our law of to-day. The uncertainties on this head were intended to be put an end to by the provisions of the Constitution of 1846 relative to a general codification.[2] It is difficult to fix the responsibility for the failure to obey a constitutional mandate in force for nearly fifty years.

The uncertainty of the term "common law of England," as used in New York, has been before referred to;[3] there was, however, less uncertainty before Independence was achieved. It ordinarily meant the non-statute law of England,[4] and as such non-statute law, contradistinguished from the statute law of England, it was, with parts of the statute law of England, made the fundamental and common law of the State by the Constitution of 1777.[5] The old embarrassment of the reservation, that such common law must be suited to transatlantic conditions,[6] was thus injected into the present century. This reservation left much to the colonial judiciary that ordinarily belongs to legislators. American society was thus fitted for the extraordinary functions ultimately committed to the judiciary in this country in respect of determining the constitutionality of statute law. They had previously passed on the relevancy of the laws of England to the colonies, and on the validity of the laws of colonial legislatures as judged by the *rationale* of the Constitution of England. It was no great stretch to intrust them with the power of judging a statute of the republican era to be constitutional or unconstitutional when compared with the standard of a written compact from which all governmental authority is now presumed to flow.[7]

The present common law of the State is of course determined primarily (1) in our own reports, which are thought

[1] Meyers *v.* Gemmel, 10 Barb. 541.

[2] Const. of 1846, Art. 1, section 17.

[3] *Supra*, p. 47, note 2. [4] *Supra*, p. 55. [5] Const. of 1777, sec. 35.

[6] *Supra*, p. 23.

[7] The only exception to this presumption is in Connecticut, where the constitution is treated as a limitation and not as a grant of power.

now to have embraced most points covered by the non-statute law. If the point is not there adjudicated, then the common law may be found (2) in some usage or in decisions of the courts of the province of New York. This source of law ordinarily receives little attention, although it may in some cases be controlling.[1] (3) If the common law is not found in either of these sources, it will then have to be found in the evidences of the non-statute law of England[2] existing prior to the battle of Concord and Lexington, April 19th, 1775, the great day when the whole legislative machinery of England, direct and indirect, ceased to be controlling here.

It is only necessary to advert further to the last source of our common law and to remind ourselves that when thus found it must be again subjected to the great ultimate test: Is it (or was it, for the question or test in point of time is not of to-day) fitted for transatlantic conditions and not repugnant to the Constitution of the State? This test, always reluctantly undertaken by the judges, leads oftentimes to amusing indirection. A judge, instead of pronouncing clearly the formula, "I find this law unfitted for adoption," professes to have ascertained that the colonists did not carry or bring the law with them,[3] as if any colonist ever carried or brought a law. Judicial metaphors are too inexact for scientific purposes, although judicial fictions are well known to have ameliorated harsh laws of ruder political societies.[4]

The Supreme Court of this State has commented on this qualified adoption of the common law of England already indicated in a way well worthy of attention; pronouncing it an adoption of essential principles, rather than of particular rules or institutes of the law of England.[5]

[1] The reason it receives little attention is due to its inaccessible form, or to the presumption that it precisely accords with the law of England. This presumption may easily go too far.

[2] Williams *v.* Williams, 8 N. Y. 525, 541.

[3] *E.g.*, Meyers *v.* Gemmel, 10 Barb. 541; De Ruyter *v.* Trustees of St. Peter's Church, 3 Barb. Ch. 119.

[4] Maine's "Ancient Law," c. II.

[5] Morgan *v.* King, 30 Barb. 14; reversed, 35 N. Y. 454, independently of the definition in the text.

But such definition is, perhaps, too abstract for the practical purposes of the present law of real property in New York. The working rule, then, is to be found in the simple statement, that the law of real property, when not expressly laid down by the Revised Statutes and not found in the cases adjudged in New York,[1] is still to be found in the original sources of the common law.[2]

[1] This includes the federal courts, for they are in one sense territorial courts.

[2] Williams *v.* Williams, 8 N. Y. 525, 541; Bogardus *v.* Trinity Church, 4 Pai. 178, 198.

CHAPTER VI.

LEGAL ESTATES UNDER THE REVISED STATUTES.

WHEN the revisers prepared the article relating to the "Creation and Division of Estates," the English judicial system, with its separate courts of law and equity, was in full force in New York, and so had been since the year 1683.[1] The legal owner of lands was that one whom the courts of law and the State recognized as such. Equitable owners and estates were taken cognizance of only in the courts of equity.

The legal owner was the permanent representative of the estate, holding the title thereto. He was recognized as the responsible owner of the land in all its relations to the State and its subordinates, although some one else might in equity be entitled to the benefits, income, and profits of the estate. In treating of the nature, quality, and quantity of estates in real property, the revisers, in the natural order of things, observed the distinction denoted, and first dealt with the more universal ownership, or that recognized by the courts of law.[2]

[1] *Supra*, p. 51; *infra*, c. VII. The judicial establishment of New York prior to the year 1846 owed its legal jurisdictions primarily to two acts: "An act to settle courts of justice," passed Nov. 1, 1683, and "An act for establishing courts of judicature," etc., passed in 1691 (Appendix 2, R. L. of 1813; Bradford's N. Y. Laws of 1694, pp. 2 and 64). The latter expired in 1699, and the common law courts stood then on ordinances of the Crown governor until "Independence" was achieved. (Notes 2 and 24, Grolier Bradford's N. Y. Laws of 1694. Daly's "Judicial Organization of the State," Pref. to 1 E. D. Smith's Reports.) For legal jurisdictions subsequent to "Independence," see N. Y. Civil List for 1867; Graham's "Treatise on the Organization and Jurisdiction of Courts in New York;" Street's "Council of Revision of the State of New York."

[2] Legal and equitable jurisdictions combined were first vested in the Supreme Court pursuant to Art. VI., Const. of 1846. Equitable interests, as contradistinguished from legal interests, were then too firmly fastened in the law of property to be greatly affected by the fusion of legal and equitable jurisdictions.

The term "estate," as used by the revisers, is defined only by the common law; at least it is not defined in the Revised Statutes. Indeed, the entire Article relating to the "Creation and Division of Estates" [1] would be incomprehensible without a resort to the definitions and the terminology of the common law then in force in this State. By the common law an estate in lands was simply that qualified dominion which was permitted to exist over lands;[2] it existed by force of the common law, by statute, or by custom. In England estates of private persons are derivative, being derived *de novo* out of an existing estate. No new estate can be made except by act of Parliament. In the province of New York estates were also derivative, being deduced either from the original estate of the Duke of York,[3] or after the merger of his private estate in the Crown,[4] from new grants or patents from the Crown, to be held by the common socage tenure.[5] The right of the Crown to create these estates without an act of Parliament has been fully considered.[6] During the War of Independence, a few of the estates thus derived from the Crown were to a limited extent formally confiscated;[7] the residue, if created before October 14th, 1775, were permitted to continue, and by force of the first constitution of the State were recognized as existing estates, paramount to every intent.[8] The confiscated lands were sold as forfeited estates by Commissioners of Forfeitures.[9] The ungranted Crown lands vested in the people of the State in their political capacity on the subversion of the monarchy:[10] the State granted these under the great seal, and by statute estates so emanating were alodial.[11] Thus there were prior to the Revised

[1] Art. I., Tit. II., Ch. I., Part I., R. S.

[2] Blackstone defines "Estate" in lands "as such interest as the tenant hath therein." 2 Bla. Com. 103. He does not apply the term "estate" to personal property. 2 Bla. Com. 389.

[3] See Appendix No. I., *infra*.

[4] *Supra*, p. 19. [5] *Supra*, pp. 10, 16. [6] *Supra*, pp. 10, 11.

[7] An act passed Oct. 22, 1779; 1 J. & V. 39.

[8] Section xxxvi., Const. of 1777; cf. 5th Amendment, U. S. Constitution.

[9] 1 J. & V. 39, 44; *supra*, p. 75.

[10] 1 J. & V. 44; People *v.* Trinity Church, 22 N. Y. 44, 46.

[11] *Supra*, p. 80.

Statutes the old estates derived from the Crown and the new estates derived from the State of New York.

The Revised Statutes finally declared all lands alodial,[1] but in so doing it subjected them not only to escheats,[2] which grew out of the common law, but also to a declaration of governmental relations to lands much more rigid and absolute[3] than the legal theory that preceded it, pursuant to which the people of the State in their political capacity had continued to be the lord paramount of the socage lands by reason of their successorship to the rights of the Crown.[4] After the commutation of the quit-rents[5] there was, however, no legal need of a continuance of socage tenure. Why this merely political seigniory of the State, limited as it was by the rules and principles of the jurisprudence adopted by the State, should have been made so absolute in terms as it is[6] by these revisers, is difficult to perceive.

"Estates" in lands were recognized by the revisers as existing institutions, and they proceeded simply to remodel the laws relating to estates to be thereafter derived out of these. The revisers did not attempt to define "estates" or "lands" anew. These were terms of science, and nothing was to be gained by revising such fundamental conceptions of property. So they adhered to the established terms, denoting the quantity and quality of the interest the legal owner might have in immovable property[8]—*e.g.*, "estates of inheritance,"[9] "for life," "for years," "at will," "by sufferance,"[10] and the like. Yet they made some changes in the common law terminology. Thus the force of the

[1] 1 R. S. 718, sec. 3.

[2] 1 R. S. 718, sec. 3; *supra*, pp. 81, 84.

[3] 1 R. S. 718, sec. 1.

[4] 1 J. & V. 44; People *v.* Trinity Church, 22 N. Y. 44; Jackson *v.* Hart, 12 Johns. 77; Jackson *v.* Ingraham, 4 Johns. 163.

[5] *Supra*, p. 35.

[6] "The people of this State in their right of sovereignty, are deemed to possess the original and ultimate property in and to all lands within the jurisdiction of the State." 1 R. S. 718, sec. 1.

[7] Co. on Litt. 4*a*, 6*a*.

[8] The *quantum* of estates of freehold remains the same now as in the days of Littleton.

[9] 1 R. S. 722, sec. 2; a fee simple, the largest estate known to the law.

[10] 1 R. S. 722, 723.

term "remainder" was so extended as to include future uses;[1] it wholly lost its common law significance, and acquired quite a new meaning.[2] This kind of statutory inversion, while confusing at first, is most skilfully worked out by the revisers.

Estates in the lands of New York existing prior to the Revised Statutes were then, as already remarked, derived from Crown grants and confirmations, or else from grants made under the great seal of the State or pursuant to the forfeited estates acts. The former were all held by a modified socage tenure of the political successor to the Crown. The lands derived from the State were alodial, but the quantity and quality of estates in them were by the common law. When the revisers made all lands alodial, they preserved the notion of "estates" by a series of well-drawn sections, which will be now further considered, for these sections are the bridge which serves to connect the old law with the existing law of real property.

An estate of inheritance was to continue to be called a fee simple, notwithstanding tenures were abolished.[3] Estates of inheritance and for life in alodial lands were to continue to be called "estates of freehold;" estates for years, to be "chattels real;" while estates at will or by sufferance were to be "chattel interests."[4] Thus a positive and known (or quantitative) value was given to future estates, properties, or interests in alodial lands. The lands themselves were alodial,[5] but the property or estates in them, as well as their quantity and quality, were of the common law, unless that law, or some particular institute of it, was clearly inconsistent with existing institutions or abrogated by some other part of the Revised Statutes. It is unnecessary, therefore, to follow farther the nature of these various estates in question, or their quantity and

[1] 1 R. S. 723, sec. 11.

[2] Hawley *v.* James, 5 Pai. 318, 466; Pond *v.* Bergh, 10 Pai. 140, 147, 156; Matter of Dodge, 105 N. Y. 585.

[3] 1 R. S. 722, sec. 2.

[4] *Ibid.*, sec. 5.

[5] To be "seised" of an alodial estate now means to own it. Matter of Dodge, 105 N. Y. 585, 591.

quality. They are too familiar to justify any mere repetition.

The revisers' difficulty consisted in dealing with the laws regulating the creation of "future estates," or "estates" not in possession. Their adoption of the common law notion of a "fee" necessarily involved their accepting the right of the possessor of the fee to parcel out his estate beyond his life, and for periods of longer or shorter duration, consistently with cognate rules of law. The admission of this right by the revisers involved a revision of the common law regulating perpetuities, for the laws against perpetuities were independent of the statute law. While in theory a "fee" then comprised all powers and dominion future and present over land, yet in point of fact it had by the common law come to mean simply inheritable property. The ability of any tenant in fee simple to suspend by some contingent limitation, or by some conveyance in trust, his successor's power of alienating land had been greatly abridged during the historic struggle over perpetuities. The great question with the revisers was, whether the common law rules regulating this right of suspending the power of alienation[1] were on the best possible foundation. The inheritable quality of landed property they did not attempt to disturb,[2] while the general power of disposing of it by last will was admitted.[3] The common law right of any owner of a fee to suspend the power of alienation was, however, regulated by a new rule, now of great importance.[4]

Conforming to the general notions of the great English commentators, the revisers divided "estates in lands" with reference to present or future dominion over them into "estates in possession" and "estates in expectancy."[5] These last embraced all estates where the ultimate or other owner's actual dominion over them was postponed. Such interests were called "future estates"[6] and "reversions."[7] Future estates included all estates to take effect *in futuro* except reversions. "Reversions" kept its exact common

[1] Cf. discussion in Thelluson *v.* Woodford, 4 Ves. 227; 11 Ves. 112.
[2] 1 R. S. 750. [3] 2 R. S. 56. [4] *Infra*, p. 114.
[5] 2 Bla. Com. 163, chap. xi.; 1 R. S. 722, 723, sections 7, 8, and 9.
[6] 1 R. S. 723, sections 9, 10. [7] 1 R. S. 723, sec. 12.

law meaning.[1] "Future estates," therefore, comprised all *quondam* "secondary," "springing" and "shifting uses," "executory devises," and "remainders." The rules relating to the taking effect of these "future estates" were, however, based on new conceptions. Their validity no longer depended on the common law rules relating to the devolution of title to lands in England. Those rules had grown either out of the law of feuds, or else out of judicial attempts to prevent perpetuities.

The central idea of the revisers was to apply approximately the laws relating to personal property, to real or immovable property, and then to shorten the common law period during which the power of alienating lands might be suspended. They therefore abrogated certain common law rules and disabilities concerning the creation of estates, because such rules had grown out of the law originally relating to feuds. They tolerated the creation of any "future estate" which did not contravene their new rule against perpetuities, but subject to the limitations prescribed by the Revised Statutes. A fee might now be mounted on a fee,[2] as freely by deed as by a will; a freehold estate might be created to commence at a future day; an estate for life might be created to commence at a future day, and it might be created in a term of years and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, might be created expectant on the determination of a term of years,[3] provided such remainder vest in interest within two lives in being.[4]

At common law real estate might be rendered inalienable for a life or lives in being at the death of the testator, and for an absolute term of twenty-one years thereafter, with a possibly slight extension for the period of gestation.[5] The revisers limited the lives by allowing two only instead of an indefinite number. The Revised Statutes are most ex-

[1] Co. on Litt. 142*b*; 1 Preston's Estates, 123; 1 R. S. 723, sec. 12.

[2] 1 R. S. 724, sec. 24; Mott *v.* Ackerman, 92 N.Y. 539, 549.

[3] 1 R. S. 724, sec. 24.

[4] *Ibid.*, sec. 20.

[5] Cadell *v.* Palmer, Tudor's Leading Cases on Real Property and Conv., note, p. 359; s.c. 1 Clark & Finnelly, 372; 1 Jarman's Powell on Devises, 388, note 1; Coster *v.* Lorillard, 14 Wend. 265, 295.

plicit on this point: "The absolute power of alienation, shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate. . . ."[1] Lives alone thus became the standard of any valid limitation suspending the power of alienation.[2] The revisers intended also to abolish the absolute term and to allow in its stead an actual minority.[3] They, however, permitted a remainder in fee, to take effect upon the determination of two lives in being at the time of the creation of the estate, to be limited to a person not in being at the testator's death, and a further contingent remainder in favor of a person not in being, to take effect in the event that the person to whom the remainder was first limited die under the age of twenty-one years.[4]

At common law several fees might be limited in the alternative by way of remainder upon the same particular estate upon such contingencies that not more than one of them could by possibility happen.[5]

Again, at common law a limitation by deed to an unborn person and then by way of purchase to the issue of such unborn person was void as to the issue.[6] If contained in a will it might be construed as a limitation in tail.[7] So the limitation of a remainder to a corporation not *in esse* or to the right heirs as purchasers of a person not *in esse* was void.[8]

By the Revised Statutes successive life estates could be limited only to persons in being at the creation thereof;

[1] 1 R. S. 723, sec. 15; *infra*, p. 149.

[2] Cruikshank *v.* Home for the Friendless, 113 N. Y., at p. 351. The leading cases bearing on the statutory standard are cited in the New York works on Real Property, and in Chaplin's "Suspension of the Power of Alienation," New York, 1891.

[3] 1 R. S. 723, sections 14, 15, and 16; Fowler *v.* Depau, 26 Barb. 224, 234.

[4] 1 R. S. 723, sections 15, 16; 1 R. S. 726, sec. 37; Manice *v.* Manice, 43 N. Y. 303, 374.

[5] Loddington *v.* Kime, 1 Salk. 224, 1 Ld. Raym. 203, and see Fearne Cont. Rem. 373.

[6] Fearne Cont. Rem. 502; Brudenell *v.* Elwes, 1 East. 452, 453; Hay *v.* Earl of Coventry, 3 T. R. 83, 86.

[7] Mr. Butler's note on Fearne Conting. Rem. 204.

[8] Cholmley's Case, 2 Rep. 50, 51; 2 Bla. Com. 170.

and where a remainder is limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto are void, and upon the death of those persons the remainder vests as if no other life estate had been attempted to be created.[1] But this section accelerating remainders referred only to vested and not to contingent remainders; when, therefore, the remainder is limited to take effect upon a contingency which has not happened at the termination of the life estate of the longest liver of the two lawful life tenants, such remainder is void.[2]

In harmony with the new rule against perpetuities, the revisers permit the rents and profits of real estate to accumulate thereafter for the benefit of minors only. They limit the period during which such accumulations may take place, so that they shall commence within the time fixed by the statute for the vesting of future estates, and terminate at the expiration of the beneficiaries' minority.[3] Thus long accumulations, such as those attempted by Mr. Thelluson in England,[4] could not be repeated here.

With a design to remedy defects in the older statutes of the State, as well as to strip the common law of non-essentials, the revisers remedied the hardships of the early acts turning estates tail into estates in fee simple,[5] by which certain remainders were cut off. Now when a remainder in fee is limited upon an estate which would have been adjudged a "fee tail at common law," such remainder is valid as a contingent limitation upon a fee, and vests in possession on the death of the first taker without issue living at the time of such death.[6] It will be observed that

[1] 1 R. S. 723, sec. 17.

[2] Purdy *v.* Hayt, 92 N. Y. 446.

[3] 1 R. S. 726, sections 37, 38; Harris *v.* Clark, 7 N. Y. 242; Pray *v.* Hegeman, 92 N. Y. 508.

[4] Thelluson *v.* Woodford, 4 Ves. 227; 11 Ves. 112. Long accumulations were in England restrained thereafter by Statutes 39 and 40 Geo. III., c. 98.

[5] *Supra*, pp. 73, 79.

[6] 1 R. S. 722, sections 3, 4; cf. Mr. Harison's argument in Anderson *v.* Jackson, 16 Johns. 382, 392; Buel *v.* Southwick, 70 N. Y. 581; Nellis *v.* Nellis, 99 N. Y. 505; Van Rensselaer *v.* Poucher, 5 Denio, 35; Vanderheyden *v.* Crandall, 2 Denio, 9.

while there is a provision in the Revised Statutes against the creation of an estate tail, the creation of a fee tail remains effective for some purposes, or as a medium of transmitting a use or title to the estate.[1] The statute operates on the legal effect of the successful creation of such an estate. Unless the fee tail is created, it obviously cannot be converted into a fee simple.[2] Fees tail are, therefore, only abolished as estates in alodial lands by their conversion into estates in "fee simple," and if no remainder is limited thereon into estates in "fee simple absolute."

The Revised Statutes do not declare tenures abolished, but "*feudal tenures*" only.[3] As long as lands are let to lease a tenure or holding of some kind, *ex necessitate rei*, exists, although the lands themselves are alodial.[4] The term "tenure," as often repeated, strictly denotes, as a term of science, a specific feudal relation subsisting between the lord and the tenant.[5] This relation it is which the statute,[6] making lands alodial, intended to sever; but this feudal relation never was created by terms of years, which as estates grew up subsequent to the feudal settlements, and pushed themselves into recognition as legal estates only by force of the statute.[7]

Leasehold estates are the estates designated by the revisers "estates for years," "estates at will," and "by sufferance;" they always existed in New York, being firmly established as estates in the law of England prior to the English occupation in 1664. They are among the estates in lands specially enumerated and recognized as continuing by the Revised Statutes.[8] The old leasehold estates in socage lands received much fine illustration in the early law reports of the State of New York.

Leasehold estates might, prior to the Statute of Frauds,[9]

[1] Nellis *v.* Nellis, 99 N. Y. 505, 511; 1 R. S. 722, sec. 3.
[2] Lott *v.* Wykoff, 2 N. Y. 355.
[3] 1 R. S. 718, sec. 3.
[4] Saunders *v.* Hanes, 44 N. Y. 353, 361.
[5] Att'y-Gen'l of Ontario *v.* Mercer, 8 L. R. App. Cas. 767, 772.
[6] *Supra*, p. 80, now in Const. of 1846, Art. I., sec. 13; Const. of 1894–95, Art. I., sec. 11.
[7] 21 Hen. VIII., c. 15.
[8] *Supra*, p. 110. [9] 29 Car. II., c. 3.

have been made by parol without writing, but after that statute an estate for years created by parol, by livery and seisin only, if for a period longer than three years, had the force of an estate at will only. This statute addressed to England had strictly no operation in New York, not mentioning the province, being in derogation of the common law and passed subsequent to the establishment of the then existing laws of England in this province.[1] But, as before stated, this fact makes it by no means conclusive that this statute was not acted on in the province,[2] the colonial judiciary frequently assuming the right in civil actions to extend some of the acts of Parliament, although they were passed subsequent to the first establishment of the laws of England in the province.[3] When Messrs. Jones and Varick came to remodel those acts of Parliament which were acted on in the province of New York and adopted by the Constitution of 1777,[4] they certainly included the Statute of Frauds, 29 Car. II.[5] It has been already stated that prior to the English Statute of Frauds the province of New York had a like statute of its own,[6] the fate of which is problematical after 1691.[7] The Revised Statutes provided that "no estate or interest in lands, other than leases for a term not exceeding one year," should thereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same.[8]

It is therefore obvious that were it not for the express abolition of livery of seisin,[9] an estate for one year would still be created in lands as at common law.

The Revised Statutes embodied many provisions concern-

[1] Clark's Colonial Law, 16; 1 Bla. Com. 108, 109; Pownall's Colonies, 102; Morris *v.* Vanderen, 1 Dallas, 64, 67.

[2] *Supra*, pp. 16, 78.

[3] Sharswood's Law Lectures, 194.

[4] *Supra*, pp. 77, 78.

[5] 2 J. & V. 91, sec. ix.; 1 K. & R. 79; 1 R. L. 75, 78.

[6] Duke's Laws of 1664, Tit. "Conveyances;" *supra*, pp. 16, 78.

[7] *Supra*, pp. 21, 58.

[8] 2 R. S. 134, sec. 6.

[9] 1 R. S. 738, sec. 136.

ing estates for years and at will, as well as rules relating to the rights and duties of landlords and tenants,[1] which may still be regarded as the basis of existing law. Several of these provisions were taken from earlier statutes both English[2] and American.[3]

In early days in New York "rent" was not always the sign of estates "for years," "at will," or "by sufferance." The reservation of a perpetual rent on an estate in fee was very common both prior[4] and subsequent to independence of the Crown. It marks a singular departure from the law of England that such conveyances in fee were here frequently termed "leases," "durable leases," or "leases in fee," by both the courts and the Legislature.[5] That such a designation is a misnomer in the law as then established there can be no question.[6] In England it is undoubted that after the Statute of *Quia Emptores* no subject could reserve a rent as incident to tenure only.[7] But where such a conveyance contained a power to distrain or a right to re-enter for the non-payment of the rent, it might be good as a rent charge.[8] It is, however, apprehended that the Statute of *Quia Emptores* was thought by the lawyers of the province of New York to have no application within the manors of New York, and that these so-called "leases" between private persons were originally in New York fee-farm grants[9] of lands lying wholly within the manors of New York; and that such grants were deemed valid even without a rent charge, because of the tenure and reversion of the manor.[10] Without the manors such grants in fee could formerly have been valid between private persons only as a rent charge.[11]

[1] 1 R. S. 744–748.

[2] 4 Geo. II., c. 28; 11 Geo. II., c. 19.

[3] 2 J. & V. 283; 1 K. & R. 134; 1 R. L. 434.

[4] Jackson *ex dem.* Van Rensselaer *v.* Hogeboom, 11 Johns. 163.

[5] Willard's "Real Estate and Conveyancing," 207; Jackson *ex dem. v.* Hogeboom, 11 Johns. 163.

[6] *Supra*, p. 45.

[7] Challis, 8.

[8] Co. on Litt. 144*a*, note 285 of Mr. Hargrave; Van Rensselaer *v.* Hayes, 19 N. Y. 68; *supra*, pp. 41, 45.

[9] *Supra*, pp. 39, 40.

[10] *Supra*, p. 29, note 8.

[11] Van Rensselaer *v.* Hayes, 19 N. Y. 68; *et supra*, note 8.

Prior to the Revised Statutes a tenant in fee simple might make leases of any duration, or reserve a rent on a grant in fee,[1] and this is believed to be still the law of alodial lands, except in so far as it is abrogated by a provision of the Constitution of 1846, adopted in view of the old agrarian difficulties growing out of the custom of perpetual rents in the manors and leases of farming lands for long terms of years. The section in question provides that thereafter "No lease or grant of agricultural land, for a longer period than twelve years, in which shall be reserved any rent or service of any kind, shall be valid."[2] The same provision is contained in the existing constitution.[3] It does not affect leases of non-agricultural lands, and leases of such lands for long terms of years are common. But they are much affected in practice by the taxing act of 1846,[4] which directs the assessors of each town to ascertain the amount of rents reserved in leases in fee, or for lives, or for a term of years exceeding twenty-one, and to assess the same against the persons entitled to such rents. Thus lands leased for a period longer than twenty-one years are twice taxed in law.[5]

Leases of non-agricultural lands for twenty-one years, with right of renewals, are very frequent in practice. In some cases a covenant is inserted fixing a net rent, free of all taxes forever, and in such cases the lease or demise may well be beyond twenty-one years. Longer leases are not infrequent. But since the "Act Concerning Tenures,"[6] any conveyance of lands in fee, even though reserving rent, operates as a deed of assignment, and not as a lease, and leaves neither any reversion nor possibility of reverter in the grantor.[7]

So, since the "Act Concerning Tenures" and the Revised Statutes the courts have been compelled to give careful attention to the distinction between conditions implied by

[1] Van Rensselaer *v.* Dennison, 35 N. Y. 393, 400.
[2] Const. of 1846, Art. I., sec. 14.
[3] Const. of 1894–95, Art. I., sec. 13.
[4] C. 327, Laws of 1846, as amended by c. 809, Laws of 1873.
[5] Van Rensselaer *v.* Dennison, 8 Barb. 23.
[6] 2 J. & V. 67; 1 K. & R. 64; 2 R. L. 70; *supra*, p. 80.
[7] Van Rensselaer *v.* Read, 26 N. Y. 558; Van Rensselaer *v.* Dennison, 35 N. Y. 393; Bradt *v.* Church, 110 N. Y. 537.

the law of tenures and those created by the act of the parties and expressed in the conveyance. Any such condition expressed in the conveyance, if it do not contravene the Revised Statutes against perpetuities, or some settled principle of the law of the land or public policy, is now valid, and a right of entry so reserved is also valid.[1] Such covenants entered into by the grantee of the lands, in behalf of himself, his heirs, and assigns are covenants real, which run with the land and are binding upon the heirs and assigns of the covenantor successively. Rents thus reserved are devisable, assignable, and descendible;[2] they preserve many of the qualities of rents issuing out of lands formerly held by the free and common socage tenure.

It will be recalled that the Revised Statutes, though abolishing tenures, carefully preserved any rents or services certain, created, or reserved in existing leases, or which thereafter might be created.[3] This accorded with the policy of all the pre-existing acts on the subject of alodial lands,[4] as well as with the constitutional ratification of the old Crown grants,[5] and the federal limitations against the impairment of contracts by any act of the State.[6]

At the present day remedies for the recovery of lands and the collection of rent due on demises are wholly independent of the common law. Distresses for rent were taken away in the year 1846,[7] and the entire machinery for the collection of rent and the recovery of possession of lands in the State became largely statutory.[8] Its further consideration belongs to a treatise on practice or to a general work on the law of real property.

The revisers do not expressly enumerate estates of mortgagees among those legal estates which they recognize as

[1] Van Rensselaer *v.* Dennison, 35 N. Y. 393, 400.
[2] Van Rensselaer *v.* Read, 26 N. Y. 558, 564, 565.
[3] 1 R. S. 718, sec. 4; *supra*, p. 98.
[4] 2 J. & V. 67; 1 K. & R. 64; 2 R. L. 70.
[5] Sec. xxxvi., Const. of 1777.
[6] U. S. Const., Art. I., sec. 10.
[7] Chap. 271, Laws of 1846.
[8] 2 R. S. 343, sec. 24; Van Rensselaer *v.* Snyder, 13 N. Y. 299; Conkey *v.* Hart, 14 N. Y. 22; Bradt *v.* Church, 110 N. Y. 537; Martin *v.* Rector, 118 N. Y. 476.

continuing in lands after the Revised Statutes.[1] Such estates are therefore excluded. The revisers treat the interest of the mortgagee as a simple security,[2] in conformity with an early American departure from the Anglican doctrine. In the State of New York the mortgagor was soon recognized even by courts of law as the legal owner of the fee.[3] In England the mortgagee took the legal title or a fee upon condition, while the mortgagor reserved usually only a permissive user of the estate until default, when his interest became a mere equity or right of redemption, recognized and enforceable in equity only.[4] Yet formerly even in New York the mortgagor in possession was treated as a tenant at will of the mortgagee, who must have given a six months' notice to the mortgagor before bringing an action of ejectment to recover possession of the premises.[5] The Revised Statutes remedied the inconsistency and took away the mortgagee's right to bring an ejectment for the recovery of the possession of the mortgaged premises.[6] The revisers also made general a very early law of New York requiring deeds with a clause of defeasance to be registered as mortgages.[7] Thereafter the remedies of a mortgagee were clearly referable to the debt, or to the power of sale usually inserted in mortgages. He had no estate in the lands, and with or without the insertion of this power in his mortgage, his rights were best enforceable by a proper decree of foreclosure and sale by a court possessing equitable jurisdiction,[8] although other remedies are still available, and the action of foreclosure and sale is not indispensable, for the

[1] 1 R. S. 722, sec. 1.

[2] 1 R. S. 756, sec. 3; cf. this treatment with the section of the Article on Uses and Trusts, which declares every interest in lands a legal right. 1 R. S. 727, sec. 45.

[3] Waters *v.* Stewart, 1 Caine's Cas. 47; Jackson *v.* Willard, 4 Johns. 41; Hitchcock *v.* Harrington, 6 Johns. 290; Runyan *v.* Mersereau, Jr., 11 Johns. 534; *supra*, p. 88.

[4] See the history of English mortgages, "Coote on Mortgages," Book I. and Book III.

[5] Jackson *ex dem. v.* Laughhead, 2 Johns. 75; Jackson *ex dem. v.* Dubois, 4 Johns. 216; Jackson *ex dem. v.* Hopkins, 18 Johns. 487.

[6] 2 R. S. 312, sec. 57.

[7] 1 K. & R. 481, sec. 3; 1 R. L. 372, sec. 3; 1 R. S. 756, sec. 3.

[8] Wiltsie on Mortgage Foreclosures, 9.

sale may be pursuant to the power alone, without the court's aid; but in practice a sale under the power of sale is rarely attempted.

Of common law life estates the Revised Statutes specifically retained "estates in dower."[1] For over two hundred and ten years the widow's estate in "dower" has existed in New York. This peculiar common law provision for the wife was incident to the tenure by free and common socage,[2] and existed here after the year 1664.[3] In the event of such tenant's death, his wife had for her natural life the third part of all the lands and tenements whereof he was seised during coverture.[4] The Duke's Laws of 1664–65 declared dower forfeited for causeless absence of the wife.[5] The "charter of Libertys," passed by the first Legislature of New York in the year 1683, contained the following provision, which was as old as Magna Charta:[6] "Thatt a widdow, after the death of her Husband shall have her dower, and shall and may tarry in the chiefe house of her husband forty days after the death of her husband, within which forty days her dower shall bee assigned her, and for her dower shall bee assigned unto her the third part of all the lands of her husband during coverture, except she were endowed of lesse before marriage."[7] This "charter" was rejected after the Duke of York ascended the throne, but without materially affecting the law of dower in New York, as it was in this respect a declaratory statute only.[8] The permanent Legislature of 1691 passed a similar charter,[9] but it shared a like fate, being rejected by the Crown.[10] The later charter or act contains no special reference to dower,

[1] 1 R. S. 740; 1 R. S. 754, sec. 20.

[2] Bisset's "Estates for Life," Chap. IV.

[3] *Supra*, p. 24.

[4] In point of fact, a ceremonial marriage was necessary in the province of New York to determine coverture.

[5] *Supra*, p. 15; Title "Dowryes;" cf. 2 Bla. Com. 136; Stat. West. 2; 13 Edw. I., c. 34.

[6] Magna Charta, ed. 1215, c. vii.

[7] 2 R. L., Appendix No. II.

[8] Doc. rel. Col. Hist. N. Y., III., 348, 351, 357, 370.

[9] 1 Bradford's N. Y. Laws of 1694, p. 15.

[10] Baskett's Laws of Prov. of N. Y.; Doc. rel. Col. Hist. N. Y., IV., 263.

and is content with a statement, "That all the lands within this Province shall be esteemed Lands of Freehold and Inheritance in free and common soccage, according to the Tenor of East Greenwich, in their Majesties Realm of England." This act also was declaratory, the tenure was already precisely as stated,[1] and although the act was disallowed,[2] the law of dower was wholly unaffected. Dower when assigned continued to exist as an estate in lands by the common law of the province, being a part of the reformed common law tenure by free and common socage. There was no local departure from the laws of England concerning this estate made during the provincial epoch.[3]

When Jones and Varick revised the English statutes deemed to extend to the province,[4] they included among them many relating to dower, including 27 Hen. VIII., c. 10, concerning jointures which barred dower.[5] The "Act concerning Dower" defined dower as a third part of all the lands of the husband during coverture. Dower in lands then held by the socage tenure was often a vested though inchoate right,[6] but the definition of the act extended dower *in futuro*, and also to those lands then made alodial.[7] In the year 1806 the Legislature, deeming the laws relative to the admeasurement of dower inadequate, provided more effective proceedings.[8] With the exception of this act and some acts relating to the dower of alien women,[9] the common law of dower was unaffected by material legislation until the Revised Statutes re-incorporated the prior legislation[10] made by the Legislature of the State of New York; but with some amendments, including one shortening the period during which the widow might demand her dower

[1] *Infra*, Appendix No. I. The merger of the Duke's estate in the Crown left the socage tenure standing by the Act 12, Car. II., c. 24; *supra*, pp. 19, 28.
[2] Doc. rel. Col. Hist. N. Y., IV., 263.
[3] 1 J. & V. 245, sec. iv.; 1 K. & R. 44; 1 R. L. 52.
[4] *Supra*, pp. 77, 78.
[5] 2 J. & V. 4; 1 K. & R. 51; 1 R. L. 56.
[6] Cf. Simar *v.* Canaday, 53 N. Y. 298, 303.
[7] 2 J. & V. 67, sec. vi.
[8] C. clxvii., Laws of 1806; 2 R. L. 60.
[9] Priest *v.* Cummings, 16 Wend. 617.
[10] 1 R. S. 740.

to twenty years after the death of her husband. The definition of "dower" in alodial lands contained in the Revised Statutes[1] precisely accords with Littleton's definition of dower in socage lands,[2] and is more accurate than the old law, said by the revisers of 1813 to have been taken from the act of 1683, the celebrated "Charter of Libertys."[3] But none of the acts is wholly independent of the common law, which alone defines the term "endowed" used in the statute, as well as the ancient custom of endowing women upon marriage. Thus a single word employed in a modern statute may be sufficient to stamp an act as auxiliary to the common law rather than as independent of it.

Until dower was admeasured or assigned the widow's right was not an estate, but a mere right to dower.[4] After dower was assigned she had a freehold estate in possession, as of the husband's seisin.[5] In the province of New York divorces *a vinculo* were allowed,[6] and it may be that the early provision of the Duke's Laws, before noticed,[7] was adopted with some indistinct reference to what was then a very unusual jurisdiction in a province of England. Jones and Varick's revision does not in terms embody the Statute of Westminster 2, c. 34, and take away dower on a divorce *a vinculo* for the fault of the wife;[8] but the revision of 1813 does embody West. 2d, c. 34,[9] and so the law now is.[10] Where the wife obtains the divorce for the fault of the husband, her dower is unaffected.[11]

But where a marriage is annulled or declared void *ab initio*, dower falls, for the simulated or putative marriage

[1] 1 R. S. 740, sec. 1.

[2] Sec. 36.

[3] 1 R. L. 86; *supra*, p. 17.

[4] Lawrence *v.* Miller, 2 N. Y. 245; Moore *v.* Mayor, etc., 8 N. Y. 110, 113.

[5] Lawrence *v.* Brown, 5 N. Y. 394, 400.

[6] A.D. 1670, Record of Court of Assizes, pp. 316, 318, 319, 519; Burtis *v.* Burtis, Hopk. 557, 563; Perry *v.* Perry, 2 Pai. 501; cf. Forrest *v.* Forrest, 25 N. Y. 501, 506.

[7] *Supra*, p. 122.

[8] 2 J. & V. 133; 1 K. & R. 93.

[9] 2 R. L. 199, sec. viii.

[10] 2 R. S. 146, sec. 48, now sec. 1759, sec. 1760, Code of Civ. Pro.; 1 R. S. 741, sec. 8.

[11] Wait *v.* Wait, 4 N. Y. 95, sec. 1759, Code Civ. Pro.; 1 R. S. 741, sec. 8.

is declared not to be a marriage; thus in law a marriage never existed.[1] *Ubi nullum matrimonium ibi nulla dos.*

The old remedy for recovering dower in the Supreme Court by writ of dower[2] was early modified in the State of New York, so as to permit the widow's application to the surrogate or to the county courts.[3] There was also an acknowledged jurisdiction in chancery.[4] The Revised Statutes abolished the writ of dower,[5] and substituted ejectment,[6] continuing, however, the proceedings in the surrogate's and county courts.[7] Under the Code of Procedure a proceeding for the admeasurement of dower became an action.[8] Since the year 1880, the present Code[9] of Civil Procedure regulates the action for dower.[10] The substantive law of dower is still found in the unrepealed portions of the Revised Statutes, which portions are in turn for the most part only declaratory of the common law.[11] The widow's dower is now alienable, and the assignee thereof may by statute sue in his own name.[12]

The adjudged cases in New York have, in consequence of the constitutional adoption of the common law, applied all the incidents of estates in dower in socage lands to the statutory estate in alodial lands, except where the common law is expressly modified by statute.[13]

The husband's estate by the curtesy was in New York an incident of the socage tenure,[14] and the estate itself seems to have been extended to the lands made alodial in 1787,[15]

[1] Price *v.* Price, 124 N. Y. 589; cf. sec. 1754, Code Civ. Pro.

[2] 2 J. & V. 5.

[3] 1 R. L. 62, sec. xii.

[4] Swaine *v.* Perine, 5 Johns. Ch. 482; Phelps *v.* Phelps, 143 N. Y. 197.

[5] 2 R. S. 343, sec. 24.

[6] 2 R. S. 303, sec. 2.

[7] 2 R. S. 488.

[8] Brown *v.* Brown, 31 How. Pr. 481, 499; sec. 30, Code of Pro.; sec. 307, *ibid.*

[9] C. 245, Laws of 1880.

[10] Sections 1596–1625.

[11] House *v.* Jackson, 50 N. Y. 161, 164; Price *v.* Price, 124 N. Y. 589, 596.

[12] Payne *v.* Becker, 87 N. Y. 153, 158; Mut'l L. Ins. Co. *v.* Shipman, 119 N. Y. 324, 330.

[13] House *v.* Jackson, 50 N. Y. 161, 164; Price *v.* Price, 124 N. Y. 589, 596.

[14] *Supra*, pp. 10, 24, 37.

[15] *Supra*, p. 84; 2 J. & V. 67.

the quantity of such estate being part of the common law adopted by the constitution[1] and independent of tenure. Curtesy was a legal estate for life,[2] dependent on marriage, seisin, issue born alive and death of the wife.[3] *Pedis possessio*, or actual entry was not requisite to the completion of this tenancy in New York.[4] The act to abolish entails in 1787[5] recognized estates by the curtesy as existing and continuing, and the Revised Statutes also save them and continue them by implication.[6]

The English statutes, 6 Edw. I., c. 3, and 32 Hen. VIII., c. 28, relative to forfeitures and the legal effect of alienations by a tenant by the curtesy were re-enacted by Jones and Varick in 1787,[7] and so passed into the Revised Laws of 1813.[8] The Revised Statutes finally declared that a conveyance made by a tenant for life or years of a greater estate than he possessed should not work a forfeiture of his estate, but operate to pass only such tenant's interest,[9] and thus the law stands.

Estates by the curtesy, having survived the Revised Statutes, were first questioned after the enactment of the acts relative to the property of married women,[10] it being then thought that the general effect of these acts was to destroy estates by the curtesy.[11] The general results of the various acts relative to the domestic relations have not been in the first instance to destroy vested rights, but to remove most of the common law disabilities of the wife, and to limit for the future the species of "*patria potestas*," which the common law master of the household enjoyed by that law.

[1] Const. of 1777, sec. xxxv.; Willard on Real Estate, 58.

[2] Adair *v.* Lott, 3 Hill, 182.

[3] Bisset on "Estates for Life," Chap. III.; Jackson *v.* Johnson, 5 Cow. 74; Dunscomb *v.* Dunscomb, 1 Johns. Ch. 508.

[4] Jackson *v.* Selleck, 8 Johns. 262.

[5] 1 J. & V. 245, sec. iv.; 1 K. & R. 44; 1 R. L. 52.

[6] 1 R. S. 754, sec. 20.

[7] 1 J & V. 98, 101; 1 K. & R. 525.

[8] 1 R. L. 181; Jackson *v.* Mancius, 2 Wend. 357.

[9] 1 R. S. 739, sec. 145.

[10] C. 200, Laws of 1848, am'd c. 375, Laws of 1849.

[11] Benedict *v.* Seymour, 11 How. Pr. 176; Billings *v.* Baker, 28 Barb. 343; cf. Clark *v.* Clark, 24 Barb. 581.

In that system, as in every other archaic system, the rights and powers of the family as a whole were to some extent concentrated (though in a lesser degree than by the Roman law) in the husband and father.[1] His *potestas* or power extended particularly to the property of the wife, whether acquired before or after marriage. The efforts of modern equity to modify the strict rules of the common law touching women's property or successions were finally seized hold of by the Legislature in this century, and greatly extended in the series of separate property acts and other cognate acts so familiar to the profession.[2]

The Married Woman's Acts of 1848 and 1849 have been generally resolved not to affect the husband's rights already vested and fixed when such acts were passed.[3] Nor do they now deprive a husband of an estate by the curtesy where the marriage happens after the acts,[4] in the event that the wife shall not have exercised in her lifetime her statutory power of disposition without his consent.[5] And although the exercise of such a power, arising under said acts, over property acquired by her subsequent to the said acts, may affect a husband's curtesy initiate, the acts themselves are said not therefore "to impair the obligations of a contract" arising by the marriage.[6] Divorce *a vinculo* for the fault of the husband destroys curtesy.[7]

The imperfect survey of legal estates in alodial lands attempted in this chapter must now conclude with a general reference to those sections of the article[8] which relate to the construction of particular limitations. Most well-drawn statutes of a reformatory character are constructed

[1] *E.g.*, "*Potestas viri.*"

[2] C. 200, Laws of 1848; c. 576, Laws of 1853; c. 375, Laws of 1849; c. 90, Laws of 1860, repealed by c. 172, Laws of 1862; c. 249, Laws of 1879, as am'd by c. 300, Laws of 1880; c. 472, Laws of 1880; c. 381, Laws of 1884; c. 537, Laws of 1887; c. 594, Laws of 1892, and see c. 616, Laws of 1892, as to release of dower by divorced women.

[3] Sleight *v.* Reed, 18 Barb. 159; Westervelt *v.* Gregg, 12 N. Y. 202.

[4] Burke *v.* Valentine, 5 Abb. Pr. N. S. 164; s.c. 52 Barb. 412; aff'd 6 Alb. Law Journ. 167; cf. Ransom *v.* Nichols, 22 N. Y. 110.

[5] Hatfield *v.* Sneden, 54 N. Y. 280, 287.

[6] Thurber *v.* Townsend, 22 N. Y. 517; Matter of Mitchell, 61 Hun, 372.

[7] 2 R. S. 146, sections 46, 47; Code of Civ. Pro., sec. 1759.

[8] 1 R. S. 721, Art. I. of Tit. II. of Chap. I. of Part II.

upon a definite scheme, in which rules of construction play a leading part. This is notably true of the Revised Statutes relating to legal estates in alodial lands.

That great rule of common law construction known as "the rule in Shelley's case"[1] is precisely reversed, and hence a remainder limited to the heirs of a person to whom a life estate is given now entitles the heirs to take as purchasers.[2]

So the term "heirs" or other words of inheritance are made unnecessary to the creation or conveyance of an estate in fee. Every grant or devise thereafter executed was to pass all the estate or interest of the grantor or testator unless the intent to pass a less estate appeared expressly or by implication in the terms of such grant.[3] It was quite otherwise by the common law.[4]

Other rules of construction in harmony with the central section against perpetuities are contained in this article of the Revised Statutes. Their consideration belongs to a graver work on the general law of real property, and not to a mere account of the form of that law.

[1] 1 Rep. 93.

[2] 1 R. S. 725, sec. 28; Barber *v.* Cary, 11 N. Y. 397, 401.

[3] *Infra*, p. 173; 1 R. S. 748, sec. 1; Crain *v.* Wright, 114 N. Y. 307, 310; Taggart *v.* Murray, 53 N. Y. 233; Sparrow *v.* Kingman, 1 N. Y. 242, 257; Freeborn *v.* Wagner, 2 Abb. Ct. Appeal Decis. 175, 179.

[4] 2 Bla. Com. 107.

CHAPTER VII.

USES AND TRUSTS UNDER THE REVISED STATUTES.

THE article of the Revised Statutes relating to uses and trusts in lands instituted many important changes in the law antecedently regulating uses and trusts in New York. What that law was is so dependent on the history of equity jurisdiction in New York as to justify its consideration in this chapter, for the English law of trusts in lands was introduced here only by the erection of courts possessing the powers and jurisdiction of the Lord High Chancellor. The Statute of Uses, which plays so important a part in the jurisdiction of the English chancellors, was always regarded as in force in New York after the year 1664,[1] both because that statute was part of the law of England when the English imposed their jurisprudence on the province,[2] and because it was an essential part of the great common law tenure by which New York was at first held of the Crown.[3] After New York became a Crown province the socage tenure was still the only one open to the Crown.[4]

The law governing the extent of equitable powers and jurisdiction in England (sometimes called the English *jus honorarium*, from the resemblance it bore to the prætorian jurisdiction of Rome[5]) is familiar learning. It will, therefore, suffice for present purposes to refer to such jurisdiction as one which ultimately became both in England and in New York complementary and supplementary of the

[1] *Supra*, p. 36, note 1; pp. 77 and 78.

[2] *Supra*, pp. 23, 55; Chalmers' Col. Opins., pp. 228, 292, 511.

[3] *Supra*, pp. 10, 16, 21, 24.

[4] *Supra*, pp. 19, 28, 29.

[5] The edicts of the prætor modified the *jus civile* just as the English chancellors modified the common law. Morey's Outlines of Roman Law, 100; cf. Scrutton's "Roman Law and the Law of England," Ch. XI.; Hunter's Rom. Law, "*jus honorarium*" *passim*.

jurisdictions exercised by the common-law courts.[1] Unfortunately there is no complete account of early equity jurisdiction in the province of New York, although there are fragmentary histories of greater or lesser degrees of accuracy and excellence.[2] It is unnecessary for us, even if it were possible, to make an extended excursus on this subject, as it will suffice for present purposes to disclose the simple machinery whereby English equity jurisdiction, including that over trusts, was imposed on the province of New York, and became part of its jurisprudence.

Prior to the year 1683 English judicial administration in New York was largely of an executive character, and very rough and temporary in its nature.[3] A court of chancery with "power to hear and determine all matters in equity" was mentioned in an act of the first representative assembly in the year 1683, and the governor and council declared to constitute the court.[4] But quite independently of this act the governor of the province, as the custodian of the great seal, was deemed by the Privy Council in England to be *ex officio* chancellor of New York,[5] and this view, after some objections from those favoring an autonomous government of the province, finally became part of the constitution of the province.[6] Nevertheless in the year 1691, after the final grant of a representative government,[7] the Legislature passed "An Act for Establishing Courts of Judicature, etc.," which also declared that "there shall be a Court of Chancery within this Province, . . . and that the governor and

[1] Wilson's "History of Modern English Law," 8.

[2] Hoffman's Chancery Practice, I., pp. 5–19; Graham's "Treatise on Organization and Jurisdiction of N. Y. Courts," p. 341; "N. Y. Civil List for 1867," Title, "Court of Chancery;" Street's "Council of Revision of the State of New York," p. 12.

[3] Hoffman states that the first bill in equity he was able to find was filed in the year 1677 (Ch. Pr., I., p. 19, note 3); cf. Street's "Council of Revision," p. 12.

[4] An Act to settle Courts of Justice, passed Nov. 1, 1683; Appendix No. IV., 2 R. L. of 1813.

[5] Doc. rel. Col. Hist. of New York, V., 946, 947. This view is entirely inconsistent with the erection of a court of chancery by any act of Assembly.

[6] Chitty's Prerog. of the Crown, 36.

[7] Hist. Int'd. to Grolier Bradford's N. Y. Laws of 1694, p. lxii.

council be the said High Court of Chancery." [1] This act was a temporary act, expiring in two years, and after several extensions it lapsed by limitation in the year 1699. Thenceforth the entire judicial establishment of the province, including the Court of Chancery, rested solely on the prerogative.[2] The late Judge Hoffman, with an evident and perhaps laudable desire to place the court of which he was a master on some better historical foundation than the *quondam* hated prerogative of the Crown, argues[3] that the act of 1683[4] revived on the expiration of the act of 1691.[5] Judge Hoffman's reasons are political rather than legal; he attributes too much power to the original act of assembly. The Court of Chancery was always independent of that act, for the Crown, in the very commission granting a permanent representative assembly, reserved to itself the power to erect courts of law and equity.[6] In reasoning upon the prerogative we must not argue from later ideals of a representative government, but only from the contemporary law and Constitution. By that Constitution the governor of this province was alone chancellor by virtue of his custody of the great seal;[7] and his ordinances for holding the courts were therefore in every respect valid.[8]

The jurisdiction of the chancellor then in New York, like that of his prototype in England, emanated originally from the Crown. Courts of equity were held in the province at stated times, pursuant to various ordinances of the governor in council, until the establishment of the State government.[9] The first Constitution of the State seemed to assume that the old judicial establishment of the province continued to be a part of the new order of things, for it mentions the chancellor and the Supreme Court justices among the future officers of the new State,[10] although it fails to provide in

[1] N. Y. Laws of 1694, p. 2.
[2] Notes 2, 24, and 36, Hist. Int'd. to Grolier Bradford's N. Y. Laws of 1694.
[3] Ch. Pr., I., p. 14 *et seq.*
[4] *Supra.*
[5] *Supra.*
[6] Doc. rel. Col. Hist. N. Y., III., 623.
[7] Chitty's Prerog. of the Crown, 36.
[8] Chalmers' Col. Opins. 195, 484.
[9] Street's "Council of Revision," p. 14; Hoffman's Ch. Pr., I., p. 11.
[10] Const. of 1777, sections iii., xxiv., xxv., xxvi.

terms for the continuance of their several courts. The mention in the Constitution of a "chancellor," as one of the future officers of the State, was probably in itself sufficient to import[1] that in the absence of any regulation to the contrary such officer was to be possessed of the well-known powers and jurisdiction of his predecessor; and this construction was ultimately put upon the powers and the functions of the chancellor of the State.[2]

While under the first and the second Constitutions of the State the powers and jurisdiction of the great common-law court might safely be referred to the section adopting the former common law,[3] the jurisdiction and the powers of the chancellors could not be so surely defined. Consequently their nature and extent were deemed much more uncertain,[4] and they were not satisfactorily settled until the Revised Statutes finally made the powers and jurisdiction of the Court of Chancery in New York co-extensive with the powers and jurisdiction of the Court of Chancery in England.[5] When the Constitution of 1846 fused legal and equitable jurisdiction in a Supreme Court possessing general jurisdiction in law and equity, the nature and extent of the equitable powers and jurisdiction of the new court were again referred to the powers and jurisdiction of the Court of Chancery in England as it stood on July 4th, 1776.[6] In this way the historic jurisdiction of the English chancellors over trusts in lands has been carried down to our own times, with the effect of preserving to some extent (notwithstanding the attempt to destroy them) those interests in lands still denominated equitable.[7] The Revised Statutes nevertheless annihilated "equitable estates" of the beneficiaries, although

[1] *E.g.*, the appointment of a burgomaster by the law of Holland invests the appointee in a Dutch colony with the well-known jurisdiction of a burgomaster in Holland.

[2] Graham's "Jurisdiction," etc., 341; Ames *v.* Blunt, 2 Pai. 94; 2 R. S. 173.

[3] Const. of 1777, sec. xxxv.; Const. of 1822–23, Art. VII., sec. 13.

[4] Yates *v.* People, 6 Johns. at p. 349, Brief of Mr. T. A. Emmett; Hoffman's Ch. Pr., Int'd, I., pp. x., xi.

[5] 2 R. S. 173, sec. 36.

[6] Const. of 1846, Art. VI.; c. 280, Laws of 1847; Onderdonk *v.* Mott, 34 Barb. 106; Code of Civ. Pro., sec. 217; Const. of 1894–95, Art. VI.

[7] McCartney *v.* Bostwick, 32 N. Y. 53.

it left a kindred class of "equitable interests" still cognizable only in the courts possessing equity jurisdiction.[1] But prior to the Revised Statutes the jurisdiction of the English chancellors over trusts was in legal theory in full force in the State of New York, and there was nothing to prevent the appearance of those anomalous equitable estates which in England corresponded with legal estates, and even with legal entails.[2] Equitable entails, like legal entails, could be barred by a common recovery.[3]

The obligation of the chancellors of the State of New York to adhere to the practice and jurisdiction of the Lord Chancellor was not, prior to the Revised Statutes, on the best foundation; for the constitutional adoption of the common law in force in the province was not always regarded as expressly adopting the proceedings and decisions of the High Court of Chancery.[4] But Chancellor Kent, at the threshold of his chancellorship (by a decision equivalent to a perpetual edict), interpreted the constitutional provision in question in a more extended manner than any yet considered here,[5] saying, "It may be laid down as a certain truth that the English system of equity jurisprudence forms an important and very essential branch of that 'common law' which was recognized in the Constitution of this State. . . . Our business, then, as questions arise is to discover what rule, if any, has been established by the courts in this State, and if none, then what was the existing rule in the English system of equity at the commencement of our Revolution?"[6] The succeeding chancellors adopted this view of their jurisdictions, and in this way the ancient and established jurisdiction of the English chancellors over uses and trusts in land (together with the twofold aspect of property known to English jurisprudence) was firmly imbedded in the jurisprudence of the State when the revisers came to their task in the year 1827.

[1] 1 R. S. 729, sec. 60.
[2] Spence's Eq. Jurisdic., Ch. X., vol. II.
[3] Mr. O'Conor in Wright *v.* Miller, 8 N. Y. 16, 17.
[4] Hoffman, Int'd. to Ch. Pr., I., pp. x. xi.
[5] *Supra*, pp. 47, note, 51, 55, 70, 71.
[6] Manning *v.* Manning, 1 Johns. Ch. 527, 531.

At the period last referred to, the English law of trusts had in practice made very little demands upon conveyancers in New York. The social and family exigencies were not yet such in this State as to make its application often extensive or necessary.[1] Yet in the manner already indicated the entire English law of trusts in lands was with few exceptions then to be regarded as a part of the law of New York; but owing to the prior infrequency of limitations in trust, and the small place which equity then filled in the jurisprudence of New York, the revisers were much more free to deal with uses and trusts in lands than with legal estates. They therefore had little hesitation in abolishing all pre-existing uses and trusts and substituting a statutory system in their place.[2] The substituted scheme involved the retention of the antinomy of the English judicial system,[3] with its separate jurisdictions in law and equity,[4] and also an important part of the Statute of Uses, whereby legal estates were vested in possession in most cases in the persons beneficially entitled.[5] The maintenance of these separate jurisdictions assured the continuance of trusts in lands,[6] although equity jurisdiction was, perhaps, more modified by the article on uses and trusts than by the chapters dealing directly with the jurisdiction of the Court of Chancery.

Trusts "were not on a true foundation, according to Lord Mansfield, until Lord Nottingham, the father of English equity, held the great seal."[7] Now, as stated before in these pages,[8] Lord Nottingham was made Lord Chancellor only in the year 1673, when New York had been for nearly a decade a province of England. Lord Eldon, who is regarded as having crowned the edifice of English equity

[1] After the R. S. the revisers were frequently engaged in litigations over trusts in lands created by persons desiring to tie up their estates for their posterity. "*Tempora mutantur, et nos mutamur in illis.*"

[2] 1 R. S. 727, Art. II., "Of Uses and Trusts."

[3] 2 R. S. 167, 196.

[4] The revisers were prevented from infringing on these jurisdictions by their constitutional recognition. Ames *v.* Blunt, 2 Pai. 94.

[5] 1 R. S. 727, sections 47, 49.

[6] McCartney *v.* Bostwick, 32 N. Y. 53, 57.

[7] Burgess *v.* Wheate, 1 Eden, 177, 223.

[8] *Supra*, pp. 50, 51.

jurisdiction, was a contemporary of Chancellor Kent, and continued to sit in the Court of Chancery of England when Chancellor Kent had ceased to be the chancellor of New York. But, as stated above, at the time the revisers approached the work of revision, uses and trusts in the lands of New York were assumed to be, and, in fact, were little different from uses and trusts of lands in England.

Anterior to the Revised Statutes, trusts were variously classified. When classified according to the duty imposed upon the trustee they were of two sorts—"naked" or "passive," and "active" or "special." The first the revisers thought it needless to retain; they were in reality what most permanent uses were before the Statute of Uses, and were therefore open to like objections. In reference to the manner of their creation, trusts were classified as "trusts by act of the parties" and "trusts by operation of law"—a classification not quite perfect, for "implied trusts" really belonged in both divisions. "Special trusts by act of the parties" were such as the revisers termed "express trusts," being of an active nature and expressed in writing pursuant to the requirements of the Statutes of Frauds or Wills.

Trusts by operation of law were variously classified as "presumptive," "resulting," and "constructive." Constructive trusts arose *ex maleficio*. "Resulting trusts" were those which chancery enforced when circumstances forbade the conclusion that a limitation absolute on its face was intended to convey the absolute usufruct with the legal estate. Being quite arbitrary, these classifications were often ignored in practice, and contrary terms were used as equivalents.[1]

Uses and trusts were further divided, according to their direct object, into "public" or "private," "charitable or eleemosynary," "pious," and "superstitious."

Prior to the Revised Statutes, the only positive restriction against the creation of private trusts in lands was that the object and purpose should not be contrary to public morals

[1] *E. g.*, 1 R. S. 728, sec. 54; Foote *v.* Bryant, 47 N. Y. 544, 547.

and policy.[1] The Statute of Frauds (29 Car. II., c. 3), which found its counterpart in legislation originating here,[2] and was afterward acted on as if in force *de jure*,[3] required all trusts in lands to be evidenced by writing. Public policy dictated that no fundamental legal rule should be violated by means of a trust; a perpetuity could not therefore be created by means of a trust.[4] The analogies between legal and equitable estates were then very striking. Trust estates were deemed susceptible of the same limitations as legal estates, and were subject to the same canons of descent. The husband had curtesy in the wife's trust estate, although dower by some anomaly was excluded. Equitable estates tail were conveyed by means of a common recovery.[5]

Precisely what effect the statutes abolishing legal entails[6] had by analogy on equitable estates tail was never decided in New York, but it was evidently the assumption of the leading property lawyer of his day in New York, that they were converted into equitable fee simples.[7]

In a note to Kent's Commentaries, Comstock, J., has furnished a very precise definition of a valid trust:[8] "(1) A sufficient expression of an intention to create a trust; (2) a beneficiary who is ascertained or capable of being ascertained; that the appointment or non-appointment of a trustee of the legal estate is not material; that if the trust or beneficial purpose be well declared, and if the beneficiary is a definite person or corporation capable of taking, the law itself will fasten the trust upon him who has the legal estate, whether the grantor, testator, heir, or next of kin, as the case may be, and that outside of the domain of *charitable uses* no definiteness of purpose will sustain a trust if there be no ascertained beneficiary who has a right to enforce it." But the insertion of the words "in trust" in a

[1] Downing *v.* Marshall, 23 N. Y. 366, 377; s. p. as to trusts in personalty; Gilman *v.* Reddington, 24 N. Y. 9, 12.

[2] *Supra*, pp. 16, 50, 78, note 7.

[3] 2 J. & V. 91.

[4] *Infra*, p. 149.

[5] Brydges *v.* Brydges, 3 Ves. 120, 126; cited 18 Ves. at p. 418.

[6] *Supra*, pp. 73, 79.

Mr. O'Conor in Wright *v.* Miller, 8 N. Y. 16 and 17.

[7] Cited in Holland *v.* Alcock, 108 N. Y., at p. 330.

devise of lands is now by no means conclusive of an intention to create a trust.[1]

The principal changes instituted in the law of uses and trusts in lands by the Revised Statutes must be very briefly summarized. The article on "Uses and Trusts,"[2] proceeding from the general to the particular, abolished all "uses and trusts" in lands, except as authorized and modified by that article, and, like the Statute of Uses, declared that every estate and interest in lands should be deemed a legal right cognizable in the courts of law, except when the statute otherwise provided.[3] While uses and trusts were thus expressly abolished and feudal tenures also declared non-existent,[4] the residue of the scheme of the Revised Statutes seems to preserve most uses,[5] so that it has been said that a covenant to stand seised, although operative only under the Statute of Uses, still remains operative to convey title as before the Revised Statutes.[6]

The scope of the repealing clause[7] just mentioned has been a fruitful theme for litigations. "Public trusts" or "charitable uses"[8] were not enumerated in the saving clause of the statute. Still many eminent persons held that they were not within the purview of the Revised Statutes, just as their predecessors had maintained that secondary uses were not within the purview of the Statute of Uses.[9] Others equally eminent held the contrary opinion.[10] Until the year 1853 this particular question was very much in doubt. Williams *v.* Williams[11] then reiterated the doctrine of the Girard College case, that the English law of charitable uses did not depend upon the statute, 43 Eliz.,

[1] Freeborn *v.* Wagner, 2 Abb. Ct. App. Decis. 175, 179.

[2] Art. II., Tit. II., Ch. I., Part II., R. S.; 1 R. S. 727.

[3] In Chapter I., Part II., R. S.

[4] *Supra*, p. 99.

[5] *Infra*, p. 141.

[6] Eysaman *v.* Eysaman, 24 Hun, 430.

[7] 1 R. S. 727, sec. 45.

[8] What were charitable uses may be ascertained from Boyle's "Law of Charities," London, 1837.

[9] Shotwell *v.* Mott, 2 Sandf. Ch. 46; Tucker *v.* St. Clement's Church, 3 Sandf. 242; 8 N. Y. 558; 1 American Law Register, 538.

[10] Yates *v.* Yates, 9 Barb. 324; King *v.* Rundle, 15 Barb. 139; Voorhes *v.* Presbyterian Church, 19 Barb. 103.

[11] 8 N. Y. 525; cf. Holland *v.* Alcock, 108 N. Y. 312, 335.

c. 4, and therefore did not fall with the repeal of the English Statutes in 1788,[1] but continued down to the Revised Statutes to be part of the common law of New York. Williams' case certainly did decide that the Revised Statutes had not abrogated the common law relating to those particular charitable uses and trusts in personal estate which could be sustained without recourse to the *cy pres*[2] doctrine. This doctrine grew out of the prerogative and not out of the judicial power of the Lord Chancellor, and therefore had no place in the common law of New York.[3] The advocates of charitable uses contended that Williams *v.* Williams supported the validity of charitable uses and trusts in lands. This was hardly tenable, and the process of distinguishing Williams *v.* Williams soon began. In Owens *v.* Missionary Society of the Methodist Church,[4] Downing *v.* Marshall,[5] and Beekman *v.* Bonsor,[6] the doctrine of Williams' case failed of application. In Levy *v.* Levy[7] it was vigorously assailed. In the case of Rose *v.* Rose[8] the Court of Appeals had shortly before held that charitable uses formed no exception to the law against perpetuities. In 1866 Williams *v.* Williams seemed to be finally overturned by the decision in Bascom *v.* Albertson,[9] but subsequently in the report of Burrill *v.* Boardman[10] the learned reporter was encouraged by some vagueness to intimate that the question was still an open one. In Holmes *v.* Mead[11] the court, finally in 1873, disapproved of the reporter's note to Burrill *v.* Boardman, and the announcement was made that the controversy was definitely closed.[12]

A new system of public trusts or charitable uses grew up in New York subsequent to 1784, and was completed by the repeal of the English Statutes in 1788. It is therefore evident that the revisers intended that the common law of

[1] C. 46, Laws of 1788, sec. 37; 2 J. & V. 282.

[2] The *cy pres* doctrine is derived originally exclusively from the Roman or civil law.

[3] Beekman *v.* Bonsor, 23 N. Y. 298.

[4] 14 N. Y. 380. [5] 23 N. Y. 366. [6] 23 N. Y. 298. [7] 33 N. Y. 97.

[8] 4 Abb. Appeal Decis. 108.

[9] 34 N. Y. 584. [10] 43 N. Y. 254. [11] 52 N. Y. 332, 338.

[12] Holland *v.* Alcock, 108 N. Y. 312, 336.

public trusts and charitable uses should not survive the Revised Statutes.[1]

A complement of charitable uses was the *cy pres* doctrine of the English Court of Chancery,[2] which has been held to have no place in New York,[3] at least after the repeal of the English Statutes in 1788.[4] It may not be amiss to observe at this point that the retention of the *cy pres* doctrine in some form, in harmony with a revised code of charities, saving all charitable uses, would have lately preserved for the public several splendid bequests and devises of great magnitude. Something already has been accomplished in a needed direction by a recent act "to regulate gifts for charitable purposes,"[5] which provides that no gift, grant, bequest, or devise to religious, educational, charitable, or benevolent uses, in other respects valid, shall be deemed invalid by reason of the indefiniteness or uncertainty of the beneficiary, and that the legal title to the lands or property given shall vest in the trustee named, or failing a trustee, in the Supreme Court. The second section of this act gives the court control over gifts and grants for such uses as are named in the act.[6]

Superstitious uses, or those which have for their object the propagation or the rites of a religion not tolerated by law, were probably invalid in the province of New York (if the Church of England was established here), and to the same extent as in England.[7] But no reported case seems

[1] Levy *v.* Levy, 33 N. Y. 97; White *v.* Howard, 46 N. Y. 144, 163; Holland *v.* Alcock, 108 N. Y. 312, 334; Cottman *v.* Grace, 112 N. Y. 299, 306; O'Conner *v.* Gifford, 117 N. Y. 275; Fosdick *v.* Town of Hempstead, 125 N. Y. 581, 591.

[2] This doctrine was made very complete and systematic by the Lord Chancellors of England. "Charities ought to be favored in law." Boyle's Law of Charities, Chap. III., Book II.

[3] Holland *v.* Alcock, 108 N. Y. 312, 330.

[4] Owens *v.* Missionary Society of the M. E. Church, 14 N. Y. 380.

[5] Chap. 701, Laws of 1893, sec. 1.

[6] *Ibid.*, sec. 2.

[7] The invalidity of "Superstitious Uses" in the Province of New York depends partly on the question, whether the Church of England was established here by law, and next on our adoption of the English statutes of 23 Hen. VIII., c. 10, and 1 Edward VI., c. 14, against superstitious uses. (See my note 31, Grolier Bradford's N. Y. Laws of 1694, p. cxxix.)

to have arisen here prior to the repeal of all the English statutes on the completion of Jones and Varick's revision,[1] when the new system of charities came into being.[2] When the Constitution of 1777 came into operation religious toleration was secured,[3] and when the statutes relative to the English Church were repealed, there ceased to be any legal standard by which to determine a "superstitious use" in the sense in which that obnoxious term is employed in the common law, and outside of the common law "superstitious use" ceases to be a term of science. Gilman *v.* McArdle[4] certainly does not decide that a trust to expend money for masses is void as a "superstitious use," while in Holland *v.* Alcock[5] a like bequest is argued on as a "charitable" or "pious use,"[6] and only avoided because this trust otherwise in terms conflicts with the law of the State regulating the definite quality of all trusts. Had the law of 1893[7] then been in force, another question would have been presented in Holland *v.* Alcock.[8]

The clause abolishing "uses" and "trusts,"[9] except as provided for in the Revised Statutes, does not seem to avert the employment of the term "shifting use" to designate certain "future interests" tolerated within certain limits by the Revised Statutes.[10]

Notwithstanding the very general repealing clause of the Revised Statutes, in relation to uses and trusts and the abolition of resulting trusts in favor of persons paying the consideration,[11] advisedly,[12] other resulting trusts in lands

[1] *Supra*, p. 79.

[2] Holland *v.* Alcock, 108 N. Y. 312.

[3] N. Y. Const. of 1777, sec. xxxviii.; Const. of 1894–95, Art. I., sec. 3; Const. U. S. Amendment, Art. I.

[4] 99 N. Y. 451.

[5] 108 N. Y. 312.

[6] At p. 329.

[7] C. 701, Laws of 1893.

[8] As to statutory application of *cy pres* doctrine, see opinion of Mr. Chief Justice Savage in Coster *v.* Lorillard, 14 Wend., at pp. 308, 309.

[9] 1 R. S. 727, sec. 45.

[10] Head-note to Gilman *v.* Reddington, 24 N. Y. 9; Harrison *v.* Harrison, 36 N. Y. 543.

[11] Garfield *v.* Hatmaker, 15 N. Y. 475; Everitt *v.* Everitt, 48 N. Y. 218; 1 R. S. 728, sec. 51. Creditors' rights were, however, saved by the next section. McCartney *v.* Bostwick, 32 N. Y. 53; Underwood *v.* Sutcliffe, 77 N. Y. 58.

[12] If the person contributing the consideration is not privy to it, *aliter* 1 R. S. 728, sec. 53; Gilbert *v.* Gilbert, 2 Abb. Appeal Decis. 256.

survive the statute—*e.g.*, in favor of partners,[1] children,[2] and other relations[3] of person paying the consideration, and although trusts relating to real estate[4] cannot be created by parol, such resulting trusts may be proven by oral evidence.[5] So trusts arising *ex maleficio*, or through the frauds of persons occupying confidential relations, survive.[6]

It was the intention of the revisers to destroy all naked or passive trusts; they were, in reality, what most uses were before the Statute of Uses, and therefore needless to retain.[7] It has been well said that the intent of this revision was simply to restore the Statute of Uses to what it was intended to be.[8] Yet such was not the only reform contemplated. The scheme was far greater than that, and involved nothing less than the complete modernization of the former law relating to land, the extinction of tenures, and the obliteration of all rules which were purely feudal and had no relation to the essential notions of all property.

To effectuate the intention of the Statute of Uses, the revisers provided that every person who, by virtue of any grant, assignment, or devise then was or thereafter became entitled to the actual possession of lands, and the receipt of the rents and profits thereof in law or in equity, was to be deemed to have a legal estate therein of the same quality and duration and subject to the same conditions as his beneficial interest.[9] This section effectually vests all such uses

[1] 1 R. S. 728, sections 50, 51; Chester *v.* Dickinson, 54 N. Y. 1; Fairchild *v.* Fairchild, 64 N. Y. 471; Traphagen *v.* Burt, 67 N. Y. 30; Greenwood *v.* Marvin, 111 N. Y. 423.

[2] Siemon *v.* Schurck, 29 N. Y. 598.

[3] Foote *v.* Bryant, 47 N. Y. 544.

[4] *Infra*, p. 160; 2 R. S. 134, sec. 6; 2 R. S. 137, sec. 2; Wheeler *v.* Reynolds, 66 N. Y. 227; Dillaye *v.* Greenough, 45 N. Y. 438, 445.

[5] Chester *v.* Dickinson, 54 N. Y. 1; Traphagen *v.* Burt, 67 N. Y. 30, 33; Swinburne *v.* Swinburne, 28 N. Y. 568; Foote *v.* Bryant, 47 N. Y. 544, 547.

[6] 1 R. S. 728, sections 50, 53; Wheeler *v.* Reynolds, 66 N. Y. 227.

[7] 1 R. S. 727, 728, sections 45, 47, 49; Rawson *v.* Lampman, 5 N. Y. 456; Downing *v.* Marshall, 23 N. Y. 366, 378, 379.

[8] Eysaman *v.* Eysaman, 24 Hun, 430, 433; cf. Wright *v.* Douglass, 7 N. Y. 564.

[9] 1 R. S. 727, sec. 47; cf. 1 R. L., p. 72, sections 1, 2, and 3.

in possession.[1] Those uses executed under the former Statute of Uses were also confirmed.[2]

In four cases only were trustees permitted to take the legal title to lands. The former active or special trusts which have thus received the sanction of the Revised Statutes[3] and survive as express trusts are indifferently termed "the four express trusts," "statutory trusts," or "trusts by virtue of the fifty-fifth section."[4] Other active or special trusts survive as "powers in trust."[5] It has been intimated that the revisers committed a grave error in attempting to enumerate "all the proper occasions for creating a trust estate."[6] But the revisers, above all things, desired to limit the number of cases where the legal title and the usufruct or the beneficial use should be in two different classes of persons, and also to vest the legal title in the persons having the beneficial use of the estate in the greatest possible number of cases.[7] The fifty-fifth section was devised for this end, and it would be difficult to affirm with truth that it has failed of its object, or that it is inartificially adapted to its purpose.

The only express trusts in lands permitted by the fifty-fifth section were:[8] "1. To sell lands for the benefit of creditors. 2. To sell, mortgage or lease lands, for the benefit of legatees, or for the purpose of satisfying any charge thereon. 3. To receive the rents and profits of lands, and apply them to the education and support, or either,[9] of any person during the life of such person, or for any shorter term subject to the rules prescribed in the first article of

[1] Salmon *v.* Stuyvesant, 16 Wend. 321, 324; Eysaman *v.* Eysaman, 24 Hun, 430; Root *v.* Stuyvesant, 18 Wend. 257.

[2] 1 R. S. 727, sec. 46.

[3] R. S. 728, sec. 55.

[4] Leggett *v.* Perkins, 2 N. Y. 297, 307; Downing *v.* Marshall, 23 N.Y. 366, 379.

[5] 1 R. S. 729, sec. 58; Belmont *v.* O'Brien, 12 N. Y. 394, 404; Downing *v.* Marshall, 23 N. Y. 366; Gilman *v.* Reddington, 24 N. Y. 9, 15.

[6] Downing *v.* Marshall, 23 N. Y. at p. 380.

[7] Heermans *v.* Robertson, 64 N. Y. 332; Cooke *v.* Platt, 98 N. Y. 35, 39.

[8] 1 R. S. 728.

[9] So up to 1830, when the third trust purpose was enlarged. C. 320, Laws of 1830; *vid. infra.*

Title II.[1] 4. To receive the rents and profits of lands, and to accumulate the same, for the purposes and within the limits prescribed in the first article of Title II.[2]

An attempt to create an express trust for any other purpose vests no estate in the trustee, but the trust may nevertheless be valid as a power in trust.[3]

The first of these trust purposes was deemed essential to the fullest protection of creditors, for had the legal title been permitted to remain in the debtor, alienation might be embarrassed and complications might arise concerning judgments and priorities under the recording acts.[4]

The second trust purpose to sell, mortgage, or lease lands, for the benefit of legatees or for the purpose of satisfying any charge thereon (when standing alone), created some difficulty. A trust to lease seemed to imply a trust to receive the rents for the term, thus contravening the Revised Statutes' own standard of perpetuity, "two lives in being;" for formerly a rent could not be reserved to a stranger.[5] But the court held that a lease was only one mode of alienation, and that its execution did not necessarily consume any appreciable space of time. When a trust is created under the other subdivisions of the fifty-fifth section, so that the trustee takes the legal estate, a power to make leases in possession is often annexed to this estate or implied, and is still valid in equity *sub modo*, and without reference to the authority conferred by the second subdivision of this section.[6]

The third of the authorized express trust purposes created much discussion, not allayed by the speedy amendment in 1830,[7] so as to cause it to read: "To receive the rents and profits of lands, and apply them to the use of any person[8]

[1] Art. I., Tit. II., Ch. I., Part II., R. S. [2] *Ibid.*

[3] 1 R. S. 729, sec. 58; Downing *v.* Marshall, 23 N. Y. 366, 377, 379; Heermans *v.* Robertson, 64 N. Y. 332; Henderson *v.* Henderson, 113 N. Y. 1, 10.

[4] Heermans *v.* Robertson, 64 N. Y. 332; People *ex rel.* Short *v.* Bacon, 99 N. Y. 275; Cunningham *v.* Freeborn, 11 Wend. 240, 249.

[5] Hawley *v.* James, 16 Wend. 61, 153.

[6] Greason *v.* Keteltas, 17 N. Y. 491.

[7] C. 320, Laws of 1830.

[8] No longer "to the education and support, or either, of any person."

during the life of such person, or for any shorter term, subject to the rules prescribed in the first article of this title."[1] The rules thus referred to are those relating to legal estates, vesting, and perpetuities.[2] The singular "person" involves the plural.[3] As originally drawn, the revisers, no doubt, intended that[4] the beneficiary should be a person *incapax*, and that the trustees should be the responsible arbiters of the beneficiaries' necessities,[5] and so they provided that if the surplus income was not otherwise disposed of, it should belong to the persons presumptively entitled to the next eventual estate;[6] and also that such surplus, beyond the sum necessary for the education and support of the beneficiary, should, in the event that there was no valid direction for accumulation, be liable in equity to the claims of creditors.[7] The amendment of 1830 somewhat disturbed the unity of the revision, which originally contemplated trusts only in the case of persons incapable by reason of some disability of looking after themselves;[8] as it was designed to abolish all formal and passive trusts, such as one to receive the rents, profits, and income of land, and pay the same over to a beneficiary.

Some members of the profession still contended that a simple trust "to receive and pay over" could not be regarded as an active trust, and that the words, "to apply to the use of," meant the same thing as "to apply to the education and support of," thus involving a discretionary application or an active trust. But the courts finally held otherwise,[9] with the result that the trust purpose "to apply to the use of," now tolerates a trust to receive and pay over the rents and profits of lands.[10] This construc-

[1] 1 R. S. 728. [2] Coster *v.* Lorillard, 14 Wend. 265, 318.

[3] 2 R. S. 778, sec. 11, Appendix.

[4] Craig *v.* Hone, 2 Edw. Ch. 554.

[5] Coster *v.* Lorillard, 14 Wend. 265, 321, 322; Leggett *v.* Perkins, 2 N. Y. 297, 310.

[6] 1 R. S. 726, sec. 40; Gilman *v.* Reddington, 24 N. Y. 9.

[7] 1 R. S. 729, sec. 57.

[8] Coster *v.* Lorillard, 14 Wend. 265, 321; Craig *v.* Hone, 2 Edw. Ch. 554.

[9] Leggett *v.* Perkins, 2 N. Y. 297, 308.

[10] Moore *v.* Hegemen, 72 N. Y. 376, 384. A beneficiary of such a trust should not be made a trustee, as complications may arise unnecessarily. Wetmore *v.* Truslow, 51 N. Y. 338.

tion of the extent of the third trust purpose, supplemented by a clause of the statute prohibiting anticipation, which is more rigorous than any the common law knew,[1] tolerates a species of naked or passive permanent trusts not originally contemplated by the revisers.[2] Trustees of the trusts last mentioned are not permitted to be the final arbiters of the beneficiaries' necessities, for the statute declares that the surplus income, beyond that which is necessary for the education and support of the beneficiary, shall be liable in equity to the claims of creditors.[3] This surplus may be reached by a creditor's bill after the return of an execution unsatisfied.[4]

Where a trust estate is created under the third subdivision of the fifty-fifth section, the fact that the beneficiary for life has also a general power of appointment by last will, and has exercised that power, does not make the property part of his assets in equity, or subject to the claims of his creditors as against his appointee.[5]

The fourth express trust purpose :[6] "To receive the rents and profits of lands, and to accumulate the same for the purposes and within the limits prescribed in the first article of this title''[7] of the Revised Statutes, restricts accumulations to a period somewhat shorter than that prescribed by the reforming statute (39 and 40 Geo. III., c. 98) enacted in England after the cases arising on Mr. Thelluson's will.[8] Accumulations of trust estates are now permitted only for the benefit of minors, and must terminate with their minority.[9]

Where a trust, permitted by the Revised Statutes, is expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees in contravention of

[1] 1 R. S. 730, sec. 63. See the historical *résumé* of this restraint in Mr. Sandford's brief in Noyes *v.* Blakeman, 6 N. Y. at pp. 574, 575.

[2] Leggett *v.* Perkins, 2 N. Y. 297, 310.

[3] 1 R. S. 729, sec. 57.

[4] Williams *v.* Thorn, 70 N. Y. 270, 273; and again 81 N. Y. 381; Tolles *v.* Wood, 99 N. Y. 616; Code Civ. Pro., sec. 2463.

[5] Cutting *v.* Cutting, 86 N. Y. 522.

[6] 1 R. S. 729.

[7] The article relating to legal estates. 1 R. S. 721.

[8] *Supra*, p. 115. [9] Harris *v.* Clark, 7 N. Y. 242.

the trust is made absolutely void.[1] But it seems that a power of sale terminating with the trust, though given to the trustee or to the *cestuis que trustent*, does not necessarily render the trust void.[2]

The enumeration in the Revised Statutes of the instances in which trust estates may be created, or, in other words, of the instances where the legal title may be cast or devolve upon a trustee, responsible to courts of equity, has not materially abridged the *jus disponendi* of owners, or deprived them of the power of impressing upon their real estates other limitations having the general characteristics of a trust besides those enumerated in the fifty-fifth section; but such other trusts, by the statute, survive as powers in trusts unless they contravene the general policy of the law or the provisions against perpetuities.[3]

The intention of the Revised Statutes to limit the instances of the active trusts to the fewest possible cases being very clear, it naturally follows that the intent to create an express trust will never be presumed in the absence of an express declaration, when the whole purpose of the settler may be accomplished without peril as a power in trust.[4]

For some time after the Revised Statutes it was a question whether or not in those cases, where trusts expressly authorized were combined with trusts unauthorized in any manner, the vice of the illegal trust purpose did not destroy the valid trusts also? The question was especially pertinent in view of the section which provided that "where an express trust shall be created for any purpose not enumerated, . . . no estate shall vest in the trustees."[5]

[1] 1 R. S. 730, sec. 65, amended by c. 275, Laws of 1882, as amended by c. 26, Laws of 1884, permitting trustees to mortgage trust property in certain cases with the consent of the Supreme Court.

[2] Crooke *v.* County of Kings, 97 N. Y. 421; cf. Belmont *v.* O'Brien, 12 N. Y. 394; Heermans v. Robertson, 64 N. Y. 332, 358.

[3] Farmers' Loan & Trust Co. *v.* Carroll, 5 Barb. 613, 652; Selden *v.* Vermilya, 3 N. Y. 525, 536; Downing *v.* Marshall, 23 N. Y. 366, 377; Belmont *v.* O'Brien, 12 N. Y. 394, 403; Gilman *v.* Reddington, 24 N. Y. 9, 15; Delaney *v.* McCormack, 88 N. Y. 174, 181; *infra*, p. 157.

[4] Heermans *v.* Robertson, 64 N. Y. 322.

[5] 1 R. S. 729, sec. 58.

But the courts adhered to the old rule, and where a trust settlement under the Revised Statutes is such that the valid and the invalid trust purposes may be separated without subverting the entire scheme of the settler, the courts will take cognizance of the valid trusts.[1]

The estate which the trustee of any of the four express or statutory trusts now takes, although apparently enlarged by the section which declares that the trustee shall be vested with the whole estate in law and in equity, subject only to the execution of the trust,[2] is in reality little enlarged. Now, as before the revision, the trustee's legal estate is commensurate with the trust duties imposed on him, and when these are performed or at an end, the trustee's estate ceases,[3] and by force of the statute[4] devolves upon the persons beneficially entitled.[5] No doubt, in a proper case a court of equity may compel, now as before the Revised Statutes, the conveyance of an outstanding legal title, although such conveyance may appear to be unnecessary in all cases.[6] The principle of "once a trustee always a trustee" has, in the case of trustees of personal estates, suffered some modification by the application of statutes of limitation;[7] but this we need not consider in this connection.

On the other hand, the revisers have provided that the persons for whose benefit a trust estate may now be created shall take no estate or interest in the lands, but may enforce the performance of the trust in equity.[8] Thus, *uno ictu*,

[1] Oxley *v.* Lane, 35 N. Y. 340; Harrison *v.* Harrison, 36 N. Y. 543; Schettler *v.* Smith, 41 N. Y. 328; Manice *v.* Manice, 43 N. Y. 303; Van Schuyver *v.* Mulford, 59 N. Y. 426.

[2] 1 R. S. 729, sec. 60.

[3] Nicoll *v.* Walworth, 4 Denio, 385; Selden *v.* Vermilya, 3 N. Y. 525; Manice *v.* Manice, 43 N. Y. 303, 363; Crooke *v.* County of Kings, 97 N. Y. 421, 446; Kip *v.* Hirsch, 103 N. Y. 565, 570.

[4] 1 R. S. 727, sec. 47; 1 R. S. 730, sec. 67.

[5] Selden *v.* Vermilya, 3 N. Y. 525; Wright *v.* Douglass, 7 N. Y. 564, 570; Ring *v.* McConn, 10 N. Y. 268, 271; *In re* Livingston, 34 N. Y. 555; Kip *v.* Hirsch, 103 N. Y. 565, 570.

[6] Anderson *v.* Mather, 44 N. Y. 249; *sed* cf. *In re* Livingston, 34 N. Y. 555, 567.

[7] Lammer *v.* Stoddard, 103 N. Y. 672; Gilmore *v.* Ham, 142 N. Y. 1, 10.

[8] 1 R. S. 729, sec. 60; cf. 97 N. Y., p. 447.

former equitable estates, with all their analogies to legal estates, were destroyed.[1] The beneficiaries of a trust for the receipt of the rents and profits of lands are precluded by the statute from assigning or disposing of their interest,[2] and if the settler authorize them to assign the same this has been said of itself to invalidate such trust.[3]

The revisers wisely changed the former rule, that on the death of a trustee of lands, such lands passed to the trustee's heirs or devisees, clothed with the trust. The title thereto, if the trust is unexecuted, now vests in the Court of Chancery[4] (Supreme Court), and it is so in the event of the death of the grantee of a power in trust.[5] The new rule has of course relation only to express trusts or to powers in trust, and not to implied or constructive trusts.[6]

The Revised Statutes have not required that an express trust in lands shall be created in any particular language, or that the exact words of the statute shall be employed. It is sufficient if 'the intention to create such trusts may be inferred from the whole will, or from a deed or conveyance in writing subscribed by the settler;' but an intent to create an express trust will not be presumed where the purpose may be accomplished under a power conferred in a deed.[7] Where the trusts are created by a conveyance recorded (as is necessary if the conveyance is to be valid against subsequent creditors of the trustees or *bonâ fide* purchasers for

[1] Noyes *v.* Blakeman, 6 N. Y. 567, 579; Crooke *v.* County of Kings, 97 N. Y. 421, 447.

[2] 1 R. S. 730, sec. 63.

[3] Coster *v.* Lorillard, 14 Wend. 265; cf. Crooke *v.* County of Kings, 97 N. Y. 421; Belmont *v.* O'Brien, 12 N. Y. 394; Heermans *v.* Robertson, 64 N. Y. 332, 353, as to alienation by trustees.

[4] 1 R. S. 730, sec. 63; Hawley *v.* Ross, 7 Pai. 103; Anderson *v.* Matner, 44 N. Y. 249; Matter of Waring, 99 N. Y. 114.

[5] 1 R. S. 734, sec. 102; Delaney *v.* McCormack, 88 N. Y. 174, 182.

[6] Johnson *v.* Fleet, 14 Wend. 176.

[7] 2 R. S. 134, sections 6, 7; Leggett *v.* Perkins, 2 N. Y. 297; Wright *v.* Douglass, 7 N. Y. 564; Dillaye *v.* Greenough, 45 N. Y. 438, 445; Vernon *v.* Vernon, 53 N. Y. 351; Heermans *v.* Robertson, 64 N. Y. 332; Moore *v.* Hegeman, 72 N. Y. 376, 384; Donovan *v.* De Mark, 78 N. Y. 244; Morse *v.* Morse, 85 N. Y. 53; cf. Foose *v.* Whitmore, 82 N. Y. 405.

[8] Heermans *v.* Robertson, 64 N. Y. 332; Henderson *v.* Henderson, 113 N. Y. 1, 11.

value and without notice[1]), it makes therefore no difference whether the authorized trusts are raised in language at once inartificial and vague, if they may be deduced or inferred; persons dealing with the trust estates must take notice of the legal effect of language, for the doctrine of notice is carried to its full extent by the Revised Statutes, and every sale or conveyance or other act of a trustee of an express trust in lands in contravention of the trust is made void.[2] But it is to be observed that the courts do not favor trusts by implication.[3]

Now, as formerly, no express trust[4] (or power in trust[5]) may transcend the rule against perpetuities. A perpetuity exists only when the absolute power of alienation is suspended. The Revised Statutes define the suspension of the power of alienation as arising, "when there are no persons in being by whom an absolute fee in possession can be conveyed," [6] and limit the period during which it is permitted to suspend such power to not more than two lives in being at the creation of the estate,[7] except in a single case already mentioned.[8] These two lives need not be connected with the estate.[9] A trust to receive the rents and profits of lands and apply them to the use of a person generally, or a trust to accumulate rents and profits generally for the benefit of one or more minors, renders the estate inalienable;[10] but the mere creation of a trust in real estate does not, *ipso facto*, suspend the power of alienation; it is only suspended where a sale by the trustee during the trust

[1] 1 R. S. 730, sec. 64; 2 R. S. 137, sec. 2.

[2] 1 R. S. 730, sec. 65; amended by c. 275, Laws of 1882, c. 26, Laws of 1884. But *bonâ fide* purchasers are, however, relieved from seeing to the application of proceeds of trust property. 1 R. S. 730, sec. 66.

[3] Foose *v.* Whitmore, 82 N. Y. 405; Henderson *v.* Henderson, 113 N. Y. 1, 11.

[4] Craig *v.* Hone, 2 Edw. Ch. 554, 566; Tucker *v.* Tucker, 5 N. Y. 408, 417.

[5] Everitt *v.* Everitt, 29 N. Y. 39, 78; Belmont *v.* O'Brien, 12 N. Y. 394, 403; 1 R. S. 737, sections 128, 129.

[6] 1 R. S. 723, sec. 14; *supra*, pp. 113, 114.

[7] 1 R. S. 723, sec. 15.

[8] *Supra*, p. 114; 1 R. S. 723, sec. 16.

[9] Crooke *v.* County of Kings, 97 N. Y. 421, 436.

[10] Radley *v.* Kuhn, 97 N. Y. 26, 31.

term would be in contravention of the trust.[1] A trust for the benefit of persons not in being when the trust estate is created does not, however, *per se*, contravene the rule against perpetuities,[2] although successive life estates in lands must be limited to persons in being at the creation thereof.[3] The subject of perpetuities belongs to an independent treatise, and will not be pursued farther.

In concluding our brief reading on the Revised Statutes relating to Uses and Trusts,[4] it may be repeated that the article was designed to effect the following reforms: The abolition of formal or passive trusts, and to that extent the fulfilment of the intention of the framers of the Statute of Uses; the restriction of the cases where trustees took the legal title to a few definite and well-known trust purposes; the abolition of secret and resulting trusts in favor of persons knowingly paying the consideration; and, lastly, to cause the title to land to devolve in the greatest possible number of instances on heirs at law and according to the ordinary rule of descents. The article on powers was the complement of this design, and its purport will be next briefly noticed.

[1] Robert *v.* Corning, 89 N. Y. 225.

[2] Gilman *v.* Reddington, 24 N. Y. 9, 14; Crooke *v.* County of Kings, 97 N. Y. 421, 439.

[3] 1 R. S. 728, sec. 17.

[4] Lord Mansfield makes a very luminous distinction between uses and trusts after the Statute of Uses (27 Hen. VIII., c. 10), and one which is still relevant to-day. Burgess *v.* Wheate, 1 Eden, at p. 216.

CHAPTER VIII.

POWERS UNDER THE REVISED STATUTES.

A POWER of disposition is one of the main attributes of property in land. Ownership of personal property included, according to the Roman lawyers, *jus disponendi, utendi, fruendi et abutendi.* While the ownership of real property involves a less complete dominion than that just indicated, it does include *jus disponendi. Jus disponendi* is said to imply *potestas disponendi* and *potestas dandi,* and out of this distinction arise what we know as "powers" in the law of real property.

The common law long since classified or subjected to scientific arrangement the lawful exercise of that delegated and qualified dominion over estates in lands, which we thus know as "powers." The "powers" referred to in the Revised Statutes relating to lands, like those of the common law, are derived out of the estate of the grantor or donor of the power, and are, as formerly, susceptible of one great and general classification: (1) Powers of appointment [1] and (2) powers of revocation.[2] The former embrace every species which raise new uses; the latter all those which supersede or displace pre-existing uses. It will thus be perceived that in one aspect, but only in the more general one, the powers of the Revised Statutes resemble the powers of the former law.[3] Yet the differences between them are quite as marked as their resemblances. The reviser's classification, however, takes no note of such a general division as that just mentioned here.

Powers prior to the Revised Statutes were either common law authorities, declarations or directions operating only in the conscience of the persons in whom the legal interest

[1] Read v. Williams, 125 N. Y. 560, 569. See execution of a power of appointment, Kane v. Astor's Ex'rs, 9 N. Y. at p. 121.

[2] 1 R. S. 738, sec. 86; Belmont v. O'Brien, 12 N. Y. 394, 404.

[3] Read v. Williams, 125 N. Y. at p. 569.

was vested, or declarations or directions deriving their effect from the Statute of Uses. A power given by a will or by an act of Parliament to sell an estate is cited as an instance of a common law authority; so is a power of attorney.[1] A power to dispose of an estate where the legal interest was vested in another was of the second kind. Powers deriving their effect from the Statute of Uses were those known to common lawyers as appendant or appurtenant, collateral or in gross, or simply collateral. The learning on powers deriving their effect from the Statute of Uses called for the exercise of the very highest order of professional ability, as it was most involved: in New York at the time of the great revision of the laws of the State, such powers were almost entirely unknown in practice.[2] The revisers, therefore, dealt very freely with the entire subject in the article on Powers.[3] The English cases are consequently, as a rule, now unsafe guides to this branch of the law of real property in New York, and the practitioner will find his greatest safety in a reliance upon the doctrines of our own courts applicable to the Revised Statutes concerning powers. The very terminology of this branch of real property learning came in with this revision.

Powers deriving their effect from the Statute of Uses were eradicated and abolished by the Revised Statutes,[4] and thenceforth the only powers connected with real estate have been those enumerated in the article on Powers, which alone governs not only their creation but their construction and execution.[5] This article was intended by the revisers to be the Alpha and Omega of the entire future law of powers related to estates in lands. Powers of attorney to convey lands in the name and for the benefit of the owner were excepted from the operation of this article of the Re-

[1] Sugden on Powers, I., 1; Wadhams *v.* Amer. Home Miss. Society, 12 N. Y. 415, 423.

[2] Statement of revisers' note to article on Powers.

[3] Art. III., 1 R. S. 731. The revisers' note on this article is very explanatory of the design and extent of the reforms contemplated.

[4] 1 R. S. 732, sec. 73; Coster *v.* Lorillard, 14 Wend. 265, 314; Hutton *v.* Benkard, 92 N. Y. 295, 304.

[5] Root *v.* Stuyvesant, 18 Wend. at p. 271; Jennings *v.* Conboy, 73 N. Y. 230, 233; Cutting *v.* Cutting, 86 N. Y. 522, 530, 537; Delaney *v.* McCormack, 88 N. Y. 174, 180.

vised Statutes.[1] Such instruments, being mere creations of common agencies, seemed to be subject to the ordinary law and to require no particular legislation to conform them to proper rules.

The revisers defined a power as "an authority to do some act in relation to lands, or the creation of estates therein, or of charges thereon, which the owner granting or reserving such power, might himself lawfully perform."[2] Formerly text writers did not concur in their definition of a power.[3] This statutory definition is sufficiently precise, but would seem to define also an express trust of lands,[4] and, indeed, it has been said "that an express trust includes a power and more,"[5] meaning, of course, by this expression a revised "power." A "power in trust" is, as its name designates, now often a trust, but one where the legal title is not by direction of the statute to be in the grantee of the power.[6] This class of powers has acquired a new significance under the Revised Statutes.

But while a power, as defined by the Revised Statutes, is like a trust of lands, in that it is an authority to do some act in relation to lands, the reviser's novel classification of powers into *general* or *special*, and *beneficial* or *in trust*,[7] makes it evident that beneficial powers sometimes offer a close analogy to the former powers appendant, in gross, or simply collateral, deriving their effect from the Statute of Uses.[8] As regards certain branches of the new law of powers, the old law occasionally offers some examples for professional consideration.[9] At least it is true that with-

[1] 1 R. S. 738, sec. 134.

[2] 1 R. S. 732, sec. 74. Like all other confidences, it cannot ordinarily be delegated. Sugden on Powers, I., 214. Mayor etc. *v.* Stuyvesant, 17 N. Y. 34, 42; cf. Crooke *v.* County of Kings, 97 N. Y. 421.

[3] Wharton's Conveyancing, 419; Crabb's Law of Real Property, 1959.

[4] 1 R. S. 728, sec. 55.

[5] Selden *v.* Vermilya, 3 N. Y. 525, 536.

[6] *Supra*, 142; *infra*, 157.

[7] 1 R. S. 732, sec. 76.

[8] "A power was never imperative," Wilmot's Opinions, 23; 2 Sugden on Powers, 158; Towler *v.* Towler, 142 N. Y. 371, 376.

[9] Allen *v.* De Witt, 3 N. Y. 276, 278; Barber *v.* Cary, 11 N. Y. 397, 402; Belmont *v.* O'Brien, 12 N. Y. 394, 404; Mayor, etc., New York *v.* Stuyvesant, 17 N. Y. 34, 42; Jennings *v.* Conboy, 73 N. Y. 230, 233.

out the influences of the old law, the new law would have taken an entirely different form; thus, much as we may desire to do so, we cannot break abruptly away from the former law on this abstruse subject: but the nicest discrimination is still called for in regard to its application.

A power is, by the Revised Statutes, *general* where it authorizes the grantee of the power to alienate a fee simple to any alienee whatever;[1] *special* in all other cases.[2] *Beneficial* when no person other than the grantee has, by the terms of its creation, any interest in its execution.[3] *In trust* either when the disposition which it authorizes excludes from its enjoyment the grantee of the power[4] or includes other persons.[5] A *power in trust* may again be either general[6] or special.[7] Thus, powers must always be either beneficial or trust powers[8]—that is to say, they must belong on one side or the other of this most general division. In one point of view the new powers, as thus classified by the Revised Statutes, are the same as the former powers, deriving their authority from the Statute of Uses; they are cut out, as it were, of a fee—for a fee embraces all powers.[9] A power in trust is said to be only an authority to limit a use;[10] and this is no doubt correct, but the statutory definition seems the better for present purposes, as it coincides with the language of the entire statute.

The article on Powers is very far from defining all the

[1] 1 R. S. 732, sec. 77; Crooke *v.* County of Kings, 97 N. Y. 421; Wright *v.* Tallmadge, 15 N. Y. 307; Coleman *v.* Beach, 97 N. Y. 545, 558.

[2] 1 R. S. 732, sec. 78; Delaney *v.* McCormack, 88 N. Y. 174, 181.

[3] 1 R. S. 732, sec. 79; Barber *v.* Cary, 11 N. Y. 397, 402; Wright *v.* Tallmadge, 15 N. Y. 307; Sweeney *v.* Warren, 127 N. Y. 426, 434; Cutting *v.* Cutting, 86 N. Y. 522.

[4] 1 R. S. 734, sections 94 and 95; Selden *v.* Vermilya, 3 N. Y. 525, 536; Belmont *v.* O'Brien, 12 N. Y. 394, 403; Downing *v.* Marshall, 23 N. Y. 366.

[5] Smith *v.* Bowen, 35 N. Y. 83, 89.

[6] 1 R. S. 734, sec. 94; Wright *v.* Methodist Epis. Church, 1 Hoffman, Ch. 201; Delaney *v.* McCormack, 88 N. Y. 174; Russell *v.* Russell, 36 N. Y. 581; Kinnier *v.* Rogers, 42 N. Y. 531.

[7] 1 R. S. 734, sec. 95; Smith *v.* Bowen, 35 N. Y. 83, 89; Cutting *v.* Cutting, 86 N. Y. 522, 536.

[8] Jennings *v.* Conboy, 73 N. Y. 230; Cutting *v.* Cutting, 86 N. Y. 522, 532.

[9] Hetzel *v.* Barber, 69 N. Y. 1, 7.

[10] Farmers' Loan and Trust Co. *v.* Carroll, 5 Barb. 613, 652, 653.

purposes for which a power may be created,[1] nor could it denote them without prescribing all the uses and purposes to which property may lawfully be dedicated or transmitted.

Having defined powers generally, the Revised Statutes next proceed to recognize by a series of sections, that an absolute power of disposition over lands ought in most cases to be treated as the highest form of property, and carry a fee to the grantee of such a plenary beneficial power.[2] When such a power over lands is granted it may be vested in two classes of persons—*i.e.*, those having a particular estate limited to them for life or years in such lands, and those not having such an estate. In either case thus provided for, the statute directs that the grant of the power shall carry a fee to its grantee in respect of creditors and purchasers; but as against all others, such transmutation is subject to any future estates limited after the estate or interest of the grantee.[3] These sections received the nicest consideration in the leading case of Cutting *v.* Cutting, where it was held that the key to the construction of the article on Powers was to be found in that article alone, and that the common law was no longer even applicable in the judicial construction of such article. It was also held in this case that the grant of a power to the beneficiary of a trust estate to appoint generally by last will did not confer on him the "absolute power of disposition" within the meaning of the section in question, so as to subject the estate after his death to a judgment against him, as it would undoubtedly have done by the law before the Revised Statutes. We have also in this case a liberal and valuable construction of the statute relative to beneficial powers and of the ninety-second section of the article on Powers, which provides that, no beneficial power, general or special, other than such as *are already enumerated*, shall be valid.[4]

[1] Read *v.* Williams, 125 N. Y. 560, 569.

[2] Freeborn *v.* Wagner, 2 Abb. Ct. App. Decis. 175, 182; Hume *v.* Randall, 141 N. Y. 499. This is so even as to executors, Kinnier *v.* Rogers, 42 N. Y. 531, 534.

[3] 1 R. S. 732, sections 81, 82, 83, 84, 85.

[4] 1 R. S. 733, sec. 92.

The final opinion in Cutting *v.* Cutting is likely, from its importance, to prove a rule of property in this State.

While a plenary power of disposition often carries a fee, it is a rule of construction that an estate in fee, created by a will, is not cut down or limited by a subsequent clause (*e.g.*, a grant of a particular power of disposition, which would not in itself carry a fee to the donee) unless it is as clear and decisive as the language of the devise itself.[1]

A beneficial power, or one where no person other than the grantee has, by the terms of its creation, any interest in its execution,[2] is what a power, as contradistinguished from a power in the nature of a trust, was before the Revised Statutes. Its execution is never imperative[3] except in the following case, and then by force of the statute and a judgment of the court: Every special and beneficial power is liable, in equity, to the claims of creditors, in the same manner as other interests that cannot be reached by an execution at law, and the execution of the power may be decreed for the benefit of creditors entitled.[4] Before this section a general power of disposition could not be reached by creditors except in cases where it was voluntarily executed; then the property appointed formed part of the debtor's assets, so as to subject it to the demands of creditors in preference to appointees.[5] Such a power now passes to the assignees of insolvents.[6]

The reservation by a grantor of an absolute power of revocation makes him the legal owner of the estate as to creditors;[7] but the reservation of such a power, as is usual in an ante-nuptial settlement, in the contingency of the failure of the contemplated marriage, is not that "absolute power of revocation" contemplated by Section 86, so as to prefer creditors of the settler or grantor to the prospective spouses.

[1] Byrnes *v.* Stilwell, 103 N. Y. 453.

[2] 1 R. S. 732, sec. 79.

[3] Sugden on Powers, I., 158; Wilmot's "Opinions," 23.

[4] 1 R. S. 734, sec. 98, and see the revisers' note to the article on Powers.

[5] Sugden on Powers, II., 27, and brief of counsel for plaintiff in Cutting *v.* Cutting, 86 N. Y. at p. 523.

[6] 1 R. S. 735, sec. 104.

[7] 1 R. S. 733, sec. 86; cf. sec. 105; Towler *v.* Towler, 142 N. Y. 371.

Some of the statutory "powers in trust" were former active trusts ;[1] others were powers in the nature of trusts.[2] By the provisions of the article, of the Revised Statutes on Uses and Trusts, the grantee of a power in trust does not, *ipso facto*, take the legal title to the lands, which vest according to legal rules, but subject to the execution of the trust as a power.[3] As the execution of such trust powers, as of trusts, remains imperative unless its execution is made to depend on the will of the grantee,[4] and as, by the statute itself, trust powers are governed by many cognate rules relating to trusts in lands,[5] their main distinction from trusts may be said to be the devolution of the legal title, which is wholly unaffected by the power in trust.[6] In some cases, however, a trustee of express trusts, having the legal title, may be also a grantee of powers in trust.[7]

The Revised Statutes left the old law affecting the cases where executors with a power of sale took the legal estate not materially changed by the Revised Statutes.[8] The "fifty-fifth section" of the Article on Trusts authorizes an express trust (*i.e.*, a trust where the fee passes) "to sell, mortgage, or lease lands for the benefit of legatees or for the purpose of satisfying any charge thereon."[9] So, since the Revised Statutes, a devise, with power of sale or mortgage to executors, may or may not carry the fee or legal title to them.[10] If not, then the power of sale is usually a

[1] 1 R. S. 734, sections 94, 95 ; *supra*, p. 142.

[2] Sugden on Powers, II., 158, 171.

[3] 1 R. S. 729, sections 56, 58, 59 ; Wainwright *v.* Low, 57 Hun, 386 ; Hetzel *v.* Barber, 69 N. Y. 1, 7 ; cf. Belmont *v.* O'Brien, 12 N. Y. 394, 404.

[4] 1 R. S. 734, sections 96, 97 ; Allen *v.* DeWitt, 3 N. Y. 276, 280 ; Moncrief *v.* Ross, 50 N. Y. 431, 436 ; Delaney *v.* McCormack, 88 N. Y. 174 ; Coleman *v.* Beach, 97 N. Y. 545 ; cf. Towler *v.* Towler, 142 N. Y. 371.

[5] 1 R. S. 734, sec. 96 ; Tilden *v.* Green, 130 N. Y. 29 ; Read *v.* Williams, 125 N. Y. 560.

[6] Moncrief *v.* Ross, 50 N. Y. 431, 435 ; Hetzel *v.* Barber, 69 N. Y. 1, 7.

[7] Belmont *v.* O'Brien, 12 N. Y. 394, 404 ; cf. Crooke *v.* County of Kings, 97 N. Y. 421, 446.

[8] 1 R. S. 729, sec. 56 ; Moncrief *v.* Ross, 50 N. Y. 431, 435 ; Sugden on Powers, I., 128.

[9] *Supra*, p. 142.

[10] 1 R. S. 729, sec. 56 ; Cooke *v.* Platt, 98 N. Y. 35 ; Kinnier *v.* Rogers, 42 N. Y. 531, 534 ; Tucker *v.* Tucker, 5 N. Y. 408.

power in trust,[1] and as such may (if its exercise is imperative and not personal) pass upon the death of a sole executor to an administrator with the will annexed.[2]

Not only are trust powers as imperative as are active trusts,[3] but their creation is also subject to all the allied regulations and principles of equity.[4] No perpetuity can be created by means of a power.[5] For the same reason no indefinite or illegal purpose, or act contrary to good morals or policy, can be authorized by a trust power.[6] In short, the ends of a trust power must be such as equity sanctions, and not inofficious, or it will be nugatory.[7]

When a revised power in trust is not imperative, but depends wholly on the will of the grantee, its resemblance to trusts ceases.[8] Its execution cannot be enforced in equity;[9] but the statute declares that a trust power is not the less imperative because the grantee has the right to select any and exclude others of the persons designated as the objects of the trust.[10]

The resemblance between trusts and most trust powers was sufficient to cause the revisers to provide for the devolution of a power in trust in the event of the death of the grantee,[11] vesting it in the Court of Chancery (now the

[1] Kinnier *v.* Rogers, 42 N. Y. 531, 534; Manice *v.* Manice, 43 N. Y. 303, 364; Moncrief *v.* Ross, 50 N. Y. 431, 435; Smith *v.* Bowen, 35 N. Y. 83, 89.

[2] Mott *v.* Ackerman, 92 N. Y. 539; Greenland *v.* Waddell, 116 N. Y. 234, 240; cf. *supra*, p. 155, note 2.

[3] 1 R. S. 734, sec. 96, Smith *v.* Floyd, 140 N. Y. 337.

[4] Smith *v.* Bowen, 35 N. Y. 83; Delaney *v.* McCormack, 88 N. Y. 174, 181; Russell *v.* Russell, 36 N. Y. 581; Tilden *v.* Green, 130 N. Y. 29.

[5] Everitt *v.* Everitt, 29 N. Y. 39, 78; Belmont *v.* O'Brien, 12 N. Y. 394, 403; and see 1 R. S. 737, sections 128 and 129.

[6] Tilden *v.* Green, 130 N. Y. 29, 54; Sweeney *v.* Warren, 127 N. Y. 426; Read *v.* Williams, 125 N. Y. 560.

[7] Belmont *v.* O'Brien, 12 N. Y. at p. 403; Read *v.* Williams, 125 N. Y. 560, 569.

[8] Towler *v.* Towler, 142 N. Y. 371, 376; Belmont *v.* O'Brien, 12 N. Y. 394, 403; Sugden on Powers, II., 158, 171.

[9] Mayor, etc., of N. Y. *v.* Stuyvesant, 17 N. Y. 4, 42; Coleman *v.* Beach, 97 N. Y. 545, 558, 559.

[10] 1 R. S. 734, sec. 97.

[11] 1 R. S. 734, sections 100, 102; Greenland *v.* Waddell, 116 N. Y. 234, 242; Delaney *v.* McCormack, 88 N. Y. 174, 182.

Supreme Court).[1] If the power be created by a will, and the testator omits to designate by whom the power is to be exercised, its execution devolves on the same court.[2] These were wide departures from the former law on this subject. The resemblance of trust powers to trusts is further exemplified in the law which subjects them to the same termination, for when the purpose for which the trust power was given ceases, the power itself ceases,[3] and such was always the law. A trust power expires by limitation, as do trusts.[4]

Powers in trust[5] to dispose of, or to distribute to, or among, or between several persons, without further direction as to share or amount, were regulated by statute so as to prevent "illusory appointments" and to settle a doubtful point of equity jurisdiction,[6] by making equality of division under such powers imperative,[7] unless an absolute discretion upon this subject was given to the grantee of such powers.[8]

Equity can decree the execution in whole or in part of a trust power for the benefit of creditors or of assignees of any person entitled as one of the objects of the trust, to compel its execution, when the interest of the objects of such trust is assignable.[9] But the court must have some positive trust to act on, and be invoked by a person having a definite interest in the execution of the power in trust, and not by a stranger.[10]

The revisers provided that a grantor in any conveyance might reserve to himself any power, beneficial or in trust, which he might lawfully grant to another.[11] A grantor thus reserving is then termed by statute the "grantee of the pow-

[1] Leggett *v.* Hunter, 19 N. Y. 445, 459; Cooke *v.* Platt, 98 N. Y. 35, 39.

[2] 1 R. S. 734, sec. 101; Meakings *v.* Cromwell, 5 N. Y. 136, 139.

[3] 1 R. S. 734, sec. 102; 1 R. S. 730, sec. 67; Manier *v.* Phelps, 15 Abb. N. C. 123, 137; Prentice *v.* Janssen, 79 N. Y. 478, 486; Harvey *v.* Brisbin, 50 Hun, 376; Hetzel *v.* Barber, 69 N. Y. 1.

[4] Bruner *v.* Meigs, 64 N. Y. 506.

[5] A power in trust has been called "a mere authority to limit a use;" Farmers' Loan and Trust Co. *v.* Carroll, 5 Barb. 613, 652–3.

[6] 1 R. S. 734, sec. 98.

[7] Butcher *v.* Butcher, 9 Ves. 382.

[8] 1 R. S. 734, sec. 99; cf. Read *v.* Williams, 125 N. Y. 560, 569.

1 R. S. 735, sec. 103.

[10] Read *v.* Williams, 125 N. Y. 560, 569.

1 R. S. 735, sec. 105; Towler *v.* Towler, 142 N. Y. 371.

er,"[1] so as to subject his reservation to the rules regulating other grants of powers. A power thus reserved is governed by all the appropriate provisions of the article on Powers.[2] When a grantor reserves to himself for his own benefit an absolute power of revocation, he is, as to creditors and purchasers, the legal owner of the estate.[3] An absolute power of revocation is, one where, in the first instance, no other person besides the grantee has a standing to prevent its exercise.[4] The distinction between a reservation of a power and a reservation of an estate is not always clear under the statute.[5]

A power may be granted by a suitable clause contained in a conveyance of some estate in the lands, to which the power relates, or by a devise contained in a last will or testament.[6]

No person is capable in law of granting a power, who is not at the same time capable of aliening some interest in the lands to which the power relates.[7] These two sections of the law relating to Powers are very explicit. The capacity of the donor or grantor admits of no refinements. He must have an interest or a legal estate in the lands affected.[8]

These provisions were supplemented by others equally explicit: "No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power, over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered, or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same, or by his lawful agent, thereunto authorized by writing."[9] This section expressly does not apply to a grant of a power by will,[10] nor, it is said, prevent a deed to declare uses.[11]

[1] 1 R. S. 738, sec. 135. [2] 1 R. S. 735, sec. 105. [3] 1 R. S. 733, sec. 86.
[4] *Supra*, p. 156. [5] Towler *v.* Towler, 142 N. Y. 371.
[6] 1 R. S. 735, sec. 106; 1 R. S. 755, c. III.; 2 R. S. 56.
[7] 1 R. S. 732, sec. 75; Dempsey *v.* Tylee, 3 Duer, 73; cf. Appendix No. II., *infra*.
[8] Selden *v.* Vermilya, 3 N. Y. 525. [9] 2 R. S. 134, sec. 6.
[10] 2 R. S. 135, sec. 7; amended in 1860, c. 322; cf. Cook *v.* Barr, 44 N. Y. 156, 160.
[11] Eysaman *v.* Eysaman, 24 Hun, at p. 434.

"A power created by deed must be more formal than one created by will."[1] But no set of words is requisite to create or reserve a power. This was so at common law,[2] and it is *à fortiori* true since the Revised Statutes.[3] Yet as a power is an authority to create an estate in lands, or a charge thereon,[4] it is best that it should not be inartificially expressed. The law of real property is always such that art in conveyancing is an economy in the end. Every well-drawn instrument fortifies the title. Powers demand unusual care, as to some extent they partake of the nature of other delegations or agencies, and are construed in like manner[5]—at least where the equities of third persons do not supervene.

The Revised Statutes do not, however, specify the purposes for which powers may be created;[6] they would be too multiform, and such a narrow regulation of the exercise of the property right would be inexpedient. But certain limitations are self-evident in the case of all powers; the purposes, as in all agencies and trusts, must be lawful, not *contra bonos mores*, or opposed to public policy; for example, a perpetuity cannot be created by means of a power.[7]

"A power may be vested in any person capable in law of holding lands. It could not be executed by a person not capable of aliening lands"[8] (excepting, as the law then stood, by a married woman[9]). Formerly a power could with few exceptions be executed only by a person *sui juris;* therefore, as a rule a *feme covert* could not execute a power so as to affect her own interest, for by marrying she put herself under the power of her husband.[10] The revisers provided that a married woman, after her majority, might execute a power without the concurrence of her husband,

[1] Jennings *v.* Conboy, 73 N. Y. at p. 234. [2] Moor, 68.

[3] Dorland *v.* Dorland, 2 Barb. 63, 80; Hubbard *v.* Gilbert, 25 Hun, 596; Towler *v.* Towler, 142 N. Y. 371, 374.

[4] 1 R. S. 732, sec. 74.

[5] Sugden on Powers, I., 213; Newton *v.* Bronson, 13 N. Y. 587.

[6] *Supra*, p. 153. [7] *Supra*, p. 149. [8] 1 R. S. 735, sec. 109.

[9] 1 R. S. 735, sec. 110; *supra*, p. 127; Amer. Home Miss. Society *v.* Wadhams, 10 Barb. 597, 604.

[10] Crabb's Law of Real Property, p. 688 *et seq.*

unless by the terms of the grant this was prohibited.[1] The revisers thus intended to remove the disability of coverture,[2] and to permit *feme coverts* to act as sole, unless the grantor restrained her from so doing. The effect of the acts relating to married women, their status and property, belongs to a period so subsequent to that under consideration as to preclude discussion.[3] But as a general principle it may be said that the "Married Women's Property" acts do not affect the law of trusts or powers as laid down in the Revised Statutes. They may render such powers and trusts less frequent in practice, just as marriage settlements are less frequent now that married women's property is free from the legal control and the debts of their husbands; but a trust for a married woman and the powers connected with the estate are still controlled by the Revised Statutes, and left substantially as before the "Married Women's" acts.[4] The Revised Statutes, however, required that if a married woman execute a power by grant it should not be valid as an execution unless she should acknowledge it on a private examination in the manner then prescribed for her execution of deeds of conveyance.[5] A private examination is now rendered unnecessary by later legislation[6] than that we are considering.

The mode of executing a revised power is now regulated by the Revised Statutes: "Where a power is vested in several persons, all must unite in its execution; but if previous to such execution, one or more of such persons shall die, the power may be executed by the survivor or survivors."[7] At common law the same rule applied,[8] and

[1] 1 R. S. 732, 733, sections 80, 87; 1 R. S. 735, sections 109, 110; 1 R. S. 737, sec. 130.

[2] Wright *v.* Tallmadge, 15 N. Y. 307; cf. Wadhams *v.* Amer. Home Miss. Society, 12 N. Y. 415, 423; Leavitt *v.* Pell, 25 N. Y. 474.

[3] C. 375, Laws of 1849; c. 576, Laws of 1853; c. 90, Laws of 1860; c. 172, Laws of 1862; c. 472, Laws of 1880; c. 537, Laws of 1887; *supra*, p. 127, note 2.

[4] Willard's "Real Estate," p. 256.

[5] 1 R. S. 736, sec. 117; 1 R. S. 758, sections 9 and 10; cf. Albany Fire Ins. Co. *v.* Bay, 4 N. Y. 9, 36.

[6] C. 249, Laws of 1879; amended c. 300, Laws of 1880.

[7] 1 R. S. 735, sec. 112; see old law as to executors, 1 R. L. 366.

[8] Sinclair *v.* Jackson, 8 Cow. 543, 553.

where a power was given to three executors, or any of them, a sale by two held good.[1]

When the consent of a third person to the execution of a power is requisite, such consent must be expressed in the instrument by which the power is executed, or certified in writing thereon. Other formalities are prescribed to meet this case.[2] "No power can be executed except by some instrument in writing, which would be sufficient in law to pass the estate or interest intended to pass under the power, if the person executing the power were the actual owner."[3] As at common law a power to be executed by deed might be effected by any conveyance good at common law, such as a feoffment,[4] lease and release,[5] so now, when it is directed to be effected by deed, it can be effected only by an instrument good as a conveyance under Chapter III., Part II., Revised Statutes.[6] When the power is directed to be effected by a will, the latter instrument must be executed in conformity with that part of the Revised Statutes which relates to Wills.[7] When a power is confined to a disposition by grant it cannot be executed by will, although the disposition is not intended to take effect until after the death of the party executing the power,[8] and such was the law before the Revised Statutes.[9] When, however, a general power of disposition is given, it may be executed either by will or grant.[10]

Under the Revised Statutes directions by the grantor of a power concerning its execution are in some cases now to be modified or supplemented by statutory intendment: (1) Where the instrument, as directed, is inadequate by rules of law to pass an estate, then the grantee or donee of the power

[1] Townesend *v.* Walley, Moore, 341.

[2] 1 R. S. 736, sec. 122; Barber *v.* Cary, 11 N. Y. 397; Kissam *v.* Dierkes, 49 N. Y. 602; cf. Phillips *v.* Davies, 92 N. Y. 199.

[3] 1 R. S. 735, sec. 113; Barber *v.* Cary, 11 N. Y. 397.

[4] Doe *v.* Thorley, 10 East. 437.

[5] Tomlinson *v.* Dighton, 1 Peere Williams, 149.

[6] Barber *v.* Cary, 11 N. Y. 397.

[7] 1 R. S. 736, sec. 115; 2 R. S. 56, sections 1 to 5, as amended by c. 782, Laws of 1867; 2 R. S. 60, sections 21, 22; 2 R. S. 63, sections 40 to 42; cf. Habergham *v.* Vincent, 2 Ves. 204.

[8] 1 R. S. 736, sec. 116; Coleman *v.* Beach, 97 N. Y. 545, 556.

[9] Reid *v.* Shergold, 10 Ves. 370; Doe *v.* Thorley, 10 East. 438.

[10] Matter of Gardner, 140 N. Y. 122.

may supplement the donor's direction by authority of the statute ;[1] (2) where superfluous formalities are prescribed by the donor or grantor, all beyond those sufficient in law to pass the estate are to be disregarded ;[2] and "where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom or in whose favor they are to be performed, they may be wholly disregarded on the execution of the power."[3] In all other cases the intentions of the grantor of a power as to the mode, time, and conditions of its execution must be observed, subject to the power of a Court of Equity to supply a defective execution in certain cases provided for.[4]

Formerly a defective execution would be relieved against in favor of a wife, children,[5] purchasers,[6] and creditors, and possibly in favor of a husband,[7] but not of a natural son.[8] The revisers expressly afford relief in the case of purchasers,[9] and where the execution of a power in trust shall be defective in whole or in part in favor of the persons designated as the object of the trust.[10] Whether the equitable jurisdiction of the court is confined at all by these sections of the statute may be regarded as doubtful. That it was somewhat extended in the case of a trust power is quite clear.

The statute declares that instruments in execution of a power are affected by fraud in the same manner as conveyances by owners or trustees,[11] which is equivalent to a clause saving existing jurisdictions.

Rules declaratory and remedial affecting the execution of a power were also contained in the Revised Statutes. No disposition by virtue of a power is now void in law on the ground that it is more extensive than was authorized by the power ; but every estate or interest so created, so far as embraced by the terms of the power, is validated by the

[1] 1 R. S. 736, sec. 118.
[2] *Ibid.*, sec. 119.
[3] 1 R. S. 736, sec. 120 ; Kissam *v.* Dierkes, 49 N. Y. 602.
[4] 1 R. S. 736, sec. 121 ; see 1 R. S. 737, sections 131, 132.
[5] Hervey *v.* Hervey, 1 Atk. 561.
[6] Coventry *v.* Coventry, Gilb. 160.
[7] Sergeson *v.* Sealey, 2 Atk. 412.
[8] Bramhall *v.* Hall, 2 Eden. 220.
[9] 1 R. S. 737, sec. 132. [10] *Ibid.*, sec. 131. [11] *Ibid.*, sec. 125.

Revised Statutes.[1] This was the common law rule, and it is now in the statutes.[2]

Every instrument executed by the grantee of a power, conveying an estate or creating a charge, which such grantee would have no right to convey or create, unless by virtue of his power, is to be deemed a valid execution of the power, although such power be not recited or referred to therein. This section does not change the rule that where one has an interest and a power and makes a deed the law will attribute it to the interest and not to the authority.[4]

So lands embraced in a power to devise, pass by a will purporting to convey all the real property of the testator, unless the intent that the will shall operate otherwise appear expressly or by necessary implication.[5] No distinction is made, in this respect, between a power of appointment and other powers.[6]

A perpetuity by indirection would be an anomaly in any well-governed State. Perpetuities by means of a power, or for any longer period than that prescribed in the article on legal estates, are expressly prevented by the Revised Statutes.[7] The execution of powers always related back to the instrument creating the power; yet before the Revised Statutes the appointee under the power did not take by relation from the time of the execution of the power.[8] But the revisers provided that "the period during which the absolute right of alienation may be suspended by any instrument in execution of a power shall be computed, not from the date of such instrument, but from the time of the creation of the power,"[9] and they have supplemented this section by the following provision: "No estate

[1] 1 R. S. 737, sec. 123.

[2] Root *v.* Stuyvesant, 18 Wend. 257, 274; Austin *v.* Oakes, 48 Hun, 492, 496.

[3] 1 R. S. 737, sec. 124.

[4] Mutual Life Ins. Co. *v.* Shipman, 119 N. Y. 324.

[5] 1 R. S. 737, sec. 126.

[6] Hutton *v.* Benkard, 92 N. Y. 295; Mott *v.* Ackerman, 92 N. Y. 539; N. Y. Life Ins. and T. Co. *v.* Livingston, 133 N. Y. 125.

[7] *Supra*, pp. 114, 161.

[8] Jackson *v.* Davenport, 20 Johns. 537; see also Matter of Stewart, 131 N. Y. 274, 281.

[9] 1 R. S. 737, sec. 128.

or interest can be given or limited to any person, by an instrument in execution of a power which such person would not have been capable of taking under the instrument by which the power was granted." [1]

Powers of sale contained in mortgages or other security vest in and may be executed by any person becoming entitled to the security.[2]

The effect of the reservation of an absolute power of revocation has been already noticed.[3] By statute, "Every power, beneficial or in trust, is irrevocable unless an authority to revoke it is granted or reserved in the instrument creating the powers." [4]

As every power is made a lien or charge on real estate as against creditors and *bona fide* purchasers only from the time the instrument containing the power is duly recorded,[5] the necessity of making a presumption of the irrevocability of the power absolute under all circumstances [6] is apparent. But as against all other persons besides creditors and *bona fide* purchasers, a power is a lien from the time the instrument in which it is contained takes effect.[7] Thus powers are conformed to the rules relative to other instruments creating estates in lands both *inter partes* and in so far as the recording acts are concerned.[8]

The leading features of the statutory law of powers, which, as we have seen, superseded in New York an ideal system or one *in posse* rather than one actually *in esse*,[9] have now been adverted to at greater length than originally intended. But the sections of the article on Powers are so correlated as to make any separate mention of particular sections very untrustworthy. There are, however, many points in the former law of powers not touched on in the

[1] 1 R. S. 737, sec. 129; Salmon *v.* Stuyvesant, 16 Wend. 321; Root *v.* Stuyvesant, 18 Wend. 257; Dempsey *v.* Tylee, 3 Duer, 73, 97.

[2] 1 R. S. 737, sec. 133; Waterman *v.* Webster, 108 N. Y. 157, 164.

[3] *Supra*, p. 160.

[4] 1 R. S. 735, sec. 108; Marvin *v.* Smith, 46 N. Y. 571, 577.

[5] *Ibid.*, sec. 107.

[6] *Ibid.*, sec. 108.

[7] *Ibid.*, sec. 107.

[8] See also 1 R. S. 736, sec. 114; 1 R. S. 755, Ch. III.

[9] *Supra*, p. 152.

Revised Statutes, *e.g.*, in what manner the powers permitted by the revisers to exist may be extinguished, released, or suspended; besides many other questions relative to the execution of such powers.[1] Naturally these will be decided by the analogies and the principles of the former law.[2]

[1] Mutual Life Ins. Co. *v.* Shipman, 119 N. Y. 324.
[2] Root *v.* Stuyvesant, 18 Wend. at p. 274; *supra*, p. 153.

CHAPTER IX.

OBSERVATIONS ON CONVEYANCING UNDER THE REVISED STATUTES.

THE Revised Statutes, in the article on "Alienation by Deed,"[1] instituted important changes in the pre-existing law. Fines and common recoveries,[2] and the mode of conveying lands by feoffment with livery of seisin, were abolished.[3] Chancellor Kent thinks that this mode of conveyance was never used in practice in this country, though lawful. He states that our conveyances have been either under the Statute of Uses or short deeds of conveyance, in the nature of the ancient feoffments, and made effectual on being duly recorded without the ceremony of livery.[4] But it is to be observed that many ancient deeds in New York, in tenor very like the primitive charter accompanying a feoffment, bear an endorsement of livery of seisin in the presence of witnesses.[5]

The Duke's Laws in 1664 required a deed to be written.[6] Prior to the year 1788 and Jones and Varick's revision of those English statutes adopted and usually acted on in New York,[7] the common mode of conveyance in the State was by "lease and release." After the repeal of the English statutes, not incorporated in that revision, a deed of bargain and sale, also operating under the Statute of Uses,[8] was commonly employed.[9] The Revised Statutes designate both these

[1] Art. IV., Tit. II., Ch. I., Part II.; 1 R. S. 738.

[2] 2 R. S. 343, sec. 24.

[3] 1 R. S. 738, sec. 136; cf. Rogers *v.* Eagle Fire Co., 9 Wend. 611, 636.

[4] 4 Kent's Com., 489; cf. Sparrow *v.* Kingman, 1 N. Y. at p. 350.

[5] There are several at Albany in the public offices.

[6] *Supra*, p. 16.

[7] *Supra*, pp. 78, 79.

[8] 2 J. & V. 68; 1 R. L. 72; Rogers *v.* Eagle Fire Co., 9 Wend. 611; 4 Kent's Com. 494–5; The Long Island R. R. Co. *v.* Conklin, 29 N. Y. 572, 584.

[9] 4 Kent's Com., 495.

forms of conveyance "grants,"[1] and then systematically apply to them[2] the leading rules relating to the ceremonial part of alienations by deed.[3] By express limitation all the rules of law then existing in respect to the delivery of deeds were made to apply to all grants in fee of a freehold; the grants, like deeds, taking effect only from delivery.[4]

At common law the term "deed" did not, *ex vi termini*, import a deed of real estate.[5] It applied to any charter or writing purporting to be a conveyance of any kind of property. The revisers no doubt intended, by their application to grants of lands of the legal principles relating to deeds, to produce a further uniformity between conveyances *inter vivos* of real estates and conveyances of personal property. They desired not only to abolish a single type of common law conveyance, but to restrict as much as was possible the shifting of titles by artificial transmutation of uses under the statutes relating to the vesting of uses in possession.[6] Much emphasis was therefore given to the sections relative to the delivery of deeds, which is now consequently a greater feature than formerly in the devolution, *inter vivos*, of titles to lands.[7] At common law a deed did not take effect from delivery, but from the livery of seisin.[8]

Nothing expressed the revisers' conceptions of a proper instrument for the future conveyance of lands so well as the term "grant," which Chancellor Kent nevertheless criticised on account of its long technical association with a deed confined to incorporeal hereditaments, incapable of livery.[9]

[1] 1 R. S. 739, sec. 142; Bucklin *v.* Bucklin, 1 Abb. Ct. Appeal Decis. 242, 247.

[2] At common law a grant applied either to a royal charter or to a conveyance of an incorporeal hereditament, but to them only.

[3] Art. IV., Tit. II., Ch. I., Part II., R. S.

[4] 1 R. S. 738, sec. 138.

[5] Blewitt *v.* Boorum, 142 N. Y. 357, 360.

[6] 1 R. S. 727, sec. 47; 1 R. S. 728, sec. 49; 1 R. L., p. 72, sections 1, 2 and 3.

[7] 1 R. S. 738, sec. 138; People *v.* Bostwick, 32 N. Y. 445; Chauncey *v.* Arnold, 24 N. Y. 330, 335; Mitchell *v.* Bartlett, 51 N. Y. 447; but delivery may be made to another for the use of the grantee, Diefendorf *v.* Diefendorf, 132 N. Y. 100; Roseau *v.* Bleau, 131 N. Y. 177; but not conditionally to a grantee, Blewitt *v.* Boorum, 142 N. Y. 357, 363.

[8] Challis, 83.

[9] 2 Bla. Com. 317; 4 Kent's Com., 490.

But as the revisers saw fit expressly to abolish the primitive conveyance by feoffment and livery of seisin, their adoption of the term "grant," which applied to conveyances of property incapable of livery, seemed particularly appropriate.[1]

Having gotten rid of the principles of the common law relative to the mode of conveyance by feoffment and livery of seisin, and having abolished all uses, except those saved in the article on Uses and Trusts, the revisers proceeded to legalize conveyances operating by means of the primitive deed or charter,[2] which was to be self-acting, independently of the Statute of Uses and livery of seisin. Thus the revisers came back to the general principles of "contract" and to their "essential nature of property,"[3] eliminating purely feudal notions of the transfer of lands. But as the deeds then in common use, "lease and release," "bargain and sale," were not essentially opposed to the revisers' conceptions of grants, their employment was tolerated by the statute,[4] but intended to be made effectual for the future on the basis of other written contracts[5] rather than by those doctrines which had relation to livery of seisin or to the vesting of uses in possession under the Statute of Uses.[6] It was this express mention of those old conveyances then in common use which has since possibly exaggerated the importance in conveyancing of the sections in the article on Uses and Trusts' now substituted for the former Statute of Uses.[7]

The other statutory requirements of an effectual or complete grant in fee involved, as before, a writing[8] or charter, sealed[9] and its execution and delivery attested, in

[1] Sparrow v. Kingman, 1 N. Y. at p. 251. In England by 8 and 9 Victoria, c. 106, sec. 2, all corporeal tenements and hereditaments now lie in grant.

[2] 1 R. S. 738, sections 137, 138.

[3] Reviser's note to sec. 7 of Art. I. of Tit. II. of Ch. I., Part II., R. S.

[4] 1 R. S. 739, sec. 142.

[5] 1 R. S. 738, sec. 138.

[6] Cf. the opinion in Eysaman v. Eysaman, 24 Hun, 430; and The Long Island R. R. Co. v. Conklin, 29 N. Y. 572, 584.

[7] Sections 47, 49, Art. II., Tit. II., Ch. I., Part II., R. S.; 1 R. S. 727, 728.

[8] 1 R. L. 72; 2 J. & V. 68.

[9] 1 R. L. of 1813, p. 78; 1 R. S. 738, sec. 137; 2 R. S. 134, sections 6 and 7; Leonard v. Clough, 133 N. Y. 292, 297.

[10] 1 R. S. 738, sec. 137.

the presence of at least one witness,[1] or else duly acknowledged before a public officer.[2] The revisers thus practically left the former law relating to parties and the ritual part of a conveyance of lands in force, and such a construction is commonly accorded to this article[3] of the Revised Statutes by both courts[4] and text writers of authority.[5] The subscription of a grant in fee was, however, made indispensable by the Revised Statutes, although at common law even signing was unnecessary, a sealing being quite sufficient.[6] The Statute of Frauds, 29 Car. II., c. 3, had first made signing essential to effectuate estates in fee,[7] and this act of signing our revisers now turned into a subscription. Attestations or acknowledgments were not made necessary to the validity of a deed *inter partes*, but only to effectuate it as to subsequent purchasers and lienors under the recording acts.[8] Since the year 1892 actual sealing is no longer necessary; the word "seal" or the letters "L. S." being made its equivalent when placed opposite the signature.[9] This statute does not, however, obviate the continued necessity of a seal or its equivalent to pass an estate of freehold.[10] It simply defines a seal. Now, a seal being made only *prima facie* evidence of consideration,[11] the necessity of its preservation on instruments of this character seems an unnecessary deference to tradition. It was evidently intended as a compromise with esoteric factors and uncertain doctrines never very well founded in the common law.[12]

That a consideration should be expressed in a deed was not, at common law, essential to its validity, and the Revised Statutes have not altered this principle.[13] But a "bar-

[1] 1 R. S. 738, sec. 137.
[2] 1 R. S. 755, 756; 1 R. S. 738, sec. 137.
[3] Art. IV., Tit II., Ch. I., Part II.
[4] Cunningham *v.* Freeborn, 11 Wend. 240, 248.
[5] 4 Kent's Com., c. lxvii.; Willard on Real Estate, etc., p. 372, *et seq.*
[6] Wright *v.* Wakeford, 17 Ves. 459.
[7] 2 J. & V. 88; 1 R. L. 78, sec. ix.
[8] Wood *v.* Chapin, 13 N. Y. 509; Strough *v.* Wilder, 119 N. Y. 530, 535.
[9] C. 677, sec. 13, Laws of 1892, Vol. 2.
[10] Cf. People *ex rel.* Norton *v.* Gillis, 24 Wend. 201.
[11] *Infra*, p. 172.
[12] See Holmes' "The Common Law," pp. 253–271, 284–287.
[13] Cunningham *v.* Freeborn, 11 Wend. 240, 248.

gain and sale" without consideration, as also a feoffment without livery of seisin, were always void at the common law;[1] they were simply inchoate or imperfect acts. When the Revised Statutes turned a "bargain and sale" and a "lease and release" into "grants," they subjected these instruments to the ordinary rules concerning deeds and estoppels, and a like construction seems to have since been accorded to them.[2] While grants may in law require a consideration to support them in certain aspects, yet it need not now be expressed.[3] By a special provision the seal has become only "*prima facie* evidence of consideration which may be rebutted in the same manner and to the same extent as if such instrument were not sealed."[4] Thus, a deed of gift under seal is none the less a deed of gift because a nominal consideration is expressed therein.[5]

No form of words is now necessary to pass an estate in fee;[6] any writing, where the intent so to do is obvious, will, if it be executed with the formalities indicated above, suffice for a grant,[7] although in common practice among conveyancers very artificial forms, covenants, powers, and reservations are still preserved by reason of their settled construction. There is certainly good reason for such retention in the case of powers, covenants, and reservations, and in complicated settlements and conveyances unnecessary legal controversies are thereby sometimes avoided. In no such case do the courts reflect on the retention of old forms, while they often animadvert on the more inartificial instruments before

[1] Schott *v.* Burton, 13 Barb. 173; Corwin *v.* Corwin, 6 N. Y. 342; Wood *v.* Chapin, 13 N. Y. 509, 517.

[2] Cunningham *v.* Freeborn, 11 Wend. 248; Sparrow *v.* Kingman, 1 N. Y. 242, 250.

[3] Morris *v.* Ward, 36 N. Y. 587, 598; Loeschigk *v.* Hatfield, 51 N. Y. 660; Ring *v.* Steele, 3 Keyes, 450; Spalding *v.* Hallenbeck, 35 N. Y. 204, 206; Ten Eyck *v.* Whitbeck, 135 N. Y. 40; s. c. 29 Abb. N. C. 314, and note, p. 325; cf. Wood *v.* Chapin, 13 N. Y. 509, 517.

[4] 2 R. S. 406, sec. 77.

[5] Morris *v.* Ward, 36 N. Y. 587.

[6] 1 R. S. 748, sections 1 and 2; Long Island R. R. Co. *v.* Conklin, 29 N. Y. 572; Kirtz *v.* Peck, 113 N. Y. 222, 229; Campbell *v.* Morgan, 22 N. Y. Supp. 1001.

[7] This was formerly the rule in case of wills; Jackson *v.* Delancey, 11 Johns. 365; aff'd, 13 *id.* 536; Pond *v.* Bergh, 10 Pai. 140, 152.

them for construction. By a recent act, having reference to the expense of recording in certain public offices long forms of deeds, shortened forms (mere algebraic equivalents of certain old covenants) are permitted to be substituted for the purposes of record, with the same force and effect as the long form.[1] The real covenant in such cases is obviously in the statute itself by inclusion, and no longer in the deed. Slight penalties are prescribed for recording the long form of deeds in Kings and New York counties.[2]

But nothing passes by a grant except what is described in it, whatever the intention of the parties may have been,[3] although the revisers have carefully provided that in the construction of such instruments (both grants and wills[4]) it shall be the duty of courts of justice to carry into effect the intent of the parties so far as the same can be collected from the whole instrument and is consistent with the rules of law.[5] This last was always the rule concerning contracts,[6] and it seemed very proper to the revisers to place it in the statute, now that most grants of lands are intended to be much on the same footing as other contracts of sale and no longer mere investitures by which, in legal theory, a new tenant was substituted in some feudal or semi-feudal subordination to a lord paramount. That the rule itself made any change in the judicial construction of deeds of conveyance can hardly be pretended;[7] it certainly did emphasize the ideas indicated.

That the term heirs, or other words, of inheritance are no longer necessary to pass a fee in a deed, has been already mentioned.[8] The same section provides that every grant or devise thereafter to be executed shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear, by express terms, or be necessarily implied in the terms of such grant.[9] Formerly the

[1] C. 475, Laws of 1890.
[2] *Ibid.*
[3] Coleman *v.* Manhattan Beach Im. Co., 94 N. Y. 229, 232.
[4] Williams *v.* Williams, 8 N. Y. 524, 539.
[5] 1 R. S. 748, sec. 2; Bennett *v.* Culver, 97 N. Y. 250, 256.
[6] French *v.* Cahart, 1 N. Y. 96, 102.
[7] Sheppard's "Touchstone," 86; Elphinstone's "Rules for the Interpretation of Deeds," 36; Bridger *v.* Pierson, 45 N. Y. 601, 604.
[8] *Supra*, p. 128; 1 R. S. 748, sec. 1.
[9] 1 R. S. 748, sec. 1.

fee did not pass by deed without the addition of the word "heirs;"[1] it being *præsumptio juris et de jure* that a life estate was intended. Now, this presumption, derived from the feudal law, is quite taken away by the statute, and the presumption is the other way. Other rules of construction will be noticed at a subsequent place.[2]

By a late Act a husband may now convey directly to his wife without the intervention of a third person, and a wife to her husband,[3] the unity of their persons, in contemplation of the law of property, being largely abrogated.[4] But by a conveyance to a husband and wife, without any words specially prescribing the kind or quality of estate each shall take, the grantees are still seised as tenants of the entirety *per tout* and not *per my*.[5]

In common practice, deeds or "grants" are now acts of the grantor alone in so far as the execution by sealing and subscription are concerned, the grantor alone signing and sealing.[6] The covenants inserted in this species of deed or "grant," commonly termed a "deed poll," are just as binding on a grantee accepting delivery thereof and his assigns as if such grantee also had signed and sealed the same; and an action of covenant may be maintained thereon against the grantee.[7] A conveyance in trust stands on the same principle, but it is more frequently *inter partes*, or executed by both grantor and grantee. Where there are numerous grantees of lands deeded on trusts, it is usual to underwrite an acceptance of the deed or trusts, as delivery of the deed to one only is not conclusive evidence of an acceptance by others named as grantees. The term "indenture" has ceased to have any technical meaning.

The covenants usually inserted in deeds are independent

[1] 2 Bla. Com. 107.

[2] *Infra*, p. 176.

[3] C. 537, Laws of 1887; cf. Hunt *v.* Johnson, 44 N. Y. 27.

[4] By the Married Women's Estates Acts, *supra*, p. 127; c. 200, Laws of 1848; c. 375, Laws of 1849; c. 90, Laws of 1860; c. 172, Laws of 1862; c. 472, Laws of 1880.

[5] Miner *v.* Brown, 133 N. Y. 308; Zorntlein *v.* Bram, 100 N. Y. 12; Bertles *v.* Noonan, 92 N. Y. 152.

[6] They are not "unilateral," but "bilateral," for both parties are bound. Cf. Sparrow *v.* Kingman, 1 N. Y. at p. 251.

[7] The Atlantic Dock Co. *v.* Leavitt, 54 N. Y. 35; Post *v.* West Shore R. R. Co., 123 N. Y. 580.

of the Revised Statutes. As Lord Eldon observed, they may be for almost anything.[1] No particular words are necessary to make a covenant;[2] but as the more common covenants have been the subject of many celebrated litigations and contentions, draftsmen usually retain in the long form of deeds the language of the covenants employed before the Revised Statutes. The old forms are just as applicable to alodial lands as to lands formerly in tenure, for, as already shown, the quantity and quality of legal estates in alodial lands are still substantially of the common law. The Revised Statutes declare that "no covenant shall be implied in any conveyance of real estate, whether such conveyance contains special covenants or not."[3] It was, however, the rule before this revision that an express covenant contained in a deed of conveyance excluded a presumption of implied covenants.[4] The Revised Statutes extended such rule to any conveyance.[5] At first there was some doubt whether this provision of the statute extended to estates for years,[6] and it was finally resolved that it did not.[7]

Lineal and collateral warranties[8] with all their incidents were abolished,[9] heirs and devisees being answerable for covenants of predecessors only to the extent of the lands devised or descended to them,[10] and in case the personal assets of such predecessors proved inadequate. Collateral warranties had been long before abolished,[11] but lineal warranties or the obligation imposed by the common law on an heir by the warranty of his ancestor to give (out of the real as-

[1] Church v. Brown, 15 Ves. 258, 264.

[2] Hallie v. Wylie, 3 Johns. 44, 48; Bull v. Follett, 5 Cow. 170; Countryman v. Deck, 13 Abb. N. C. 110. In drawing a covenant intended to run with the land it is better to say: "This covenant shall run with the land granted." 13 Abb. N. C., note 114, 116.

[3] 1 R. S. 738, sec. 140; Read v. Erie Ry. Co., 97 N. Y. 341, 348.

[4] Vanderkarr v. Vanderkarr, 11 Johns. 122.

[5] Leggett v. Mutual L. Ins. Co. 53 N. Y. 394.

[6] Tone v. Brace, 11 Pai. 566, 569; Kinney v. Watts, 14 Wend. 38.

[7] Mayor of N. Y. v. Mabie, 13 N. Y. 151, 158.

[8] As to distinction between these warranties see note 320, Co. on Litt., 370b.

[9] 1 R. S. 739, sec. 141; cf. 1 R. L. 525, sec. xxvi.; 4 Anne, c. 16.

[10] 2 R. S. 109, sec. 53.

[11] 1 R. L. 525, sec. xxvi.; 2 J. & V. 281; 4 Anne, c. 16.

sets descended to the heir) to the warrantee on his eviction lands of equal value to those lost, were regulated by the revisers.[1]

The Revised Statutes[2] contained also several rules of importance as regards the legal effect of a grant:

1. A grantor could not by any conveyance pass an estate greater than such grantor possessed at the date of delivery of the deed, except that every grant was made conclusive against the grantor and his heirs.[3] Every grant was also conclusive against subsequent purchasers from such grantor, or his heirs claiming as such, except, however, subsequent purchasers in good faith and for value who acquired a superior title by a conveyance first recorded.[4] At common law a tortious feoffment with livery of seisin passed a fee,[5] and after descent cast entry was tolled, and the remedies of the disseisee became very complicated,[6] as presumptions then favored mere possessory titles to a greater extent than at present. The abolition of warranties and the destruction by the Revised Statutes of all the legal presumption favoring a title derived from a wrongful possessor brought conveyances of lands to a foundation more in harmony with the recording acts.[7]

2. A conveyance made by a tenant for life or years of a greater estate than he possessed or could lawfully convey does not now, as formerly it did, work a forfeiture of his estate, but is operative to pass all his interest therein.[8]

3. Every grant of lands is made absolutely void if at the time of its delivery such lands are in the actual possession of a person claiming under a title adverse to the grantor.[9]

[1] 2 R. S. 109, 452, 453; Hill v. Ressegein, 17 Barb. 162.

[2] Art. IV. of Tit. 2, c. I., Part II., R. S.

[3] 1 R. S. 739, sec. 143; Thompson v. Simpson, 128 N. Y. 270; Sage v. Cartright, 9 N. Y. 49; Sparrow v. Kingman, 1 N. Y. 242, 251.

[4] 1 R. S. 739, sec. 144.

[5] Sparrow v. Kingman, 1 N. Y. 242, 250; Thompson v. Simpson, 128 N. Y. 270, 285.

[6] 3 Bla. Com., ch. 10.

[7] Thompson v. Simpson, 128 N. Y. 270, 285.

[8] 1 R. S. 739, sec. 145; Sparrow v. Kingman, 1 N. Y. 242, 257; cf. 1 R. L. 181, sections 1, 2, 7; Moore v. Littel, 41 N. Y. 66, 78.

[9] 1 R. S. 739, sec. 147; cf. 1 R. L. 173, sec. viii.; Crary v. Goodman, 22

An exception is, however, made in the case of a mortgage by a person out of possession but having a just title to the lands so held adversely.[1]

The present system of conveyancing finds its complement largely in the acts relating to the proof and the recording of conveyances of real estate.[2] While conveyances are perfect as between the parties without being recorded,[3] unrecorded conveyances are avoided by the statutes as against subsequent purchasers in good faith and for a valuable consideration.[4] To entitle any conveyance to be recorded it must be acknowledged by the parties executing the same, or proved by a subscribing witness and in the manner provided by law.[5]

These technical rules are amplified by the text of many competent authorities. Their consideration is beyond the scope of this essay.

N. Y. 170; Towle *v.* Remsen, 70 N. Y. 303, 313; Danziger *v.* Boyd, 120 N. Y. 628.

[1] 1 R. S. 739, sec. 148. [2] 1 R. S. 755. [3] *Supra*, p. 171.
[4] 1 R. S. 756, sec. 1. [5] *Ibid.*, sec. 4.

APPENDIX NO. I.

PATENT TO THE DUKE OF YORK, 1664.

Charles the Second By the grace of God King of England Scotland ffrance and Ireland defender of the ffaith etc To ALL to whome these presents shall come Greeting KNOW YEE that wee for divers good Causes and Consideracons us thereunto moveing HAVE of our especiall grace certaine knowledge and meere mocon given and Graunted And by these presents for us our heires and Successors DOE give and Graunt unto our dearest Brother James Duke of Yorke his heires and Assignes ALL that part of the Mayne land of New England beginning att a certaine Place called or knowne by the name of S^{t} Croix next adioyneing to New Scotland in America and from thence extending along the Sea Coast unto a certaine Place called Petuaquine or Pemaquid and (soe) upp the River thereof to the furthest head of the same as itt tendeth Northwards and extending from thence to the River of Kinebequi and soe upwards by the shortest course to the River Cannada Northward And alsoe all that Island or Islands comonly called by the severall name or names of Matowacks or Long Island scituate lyeing and being towards the west of Cope Codd and the Narro Higansetts abutting upon the Mayne land betweene the twoe Rivers there called or knowne by the severall names of Conectecutte and Hudsons River Together alsoe with the said River called Hudsons River and all the land from the west side of Connectecutte River to the East side of De la Ware Bay And alsoe all those severall Islands called or knowne by the names of Martin Vinyards and Nantukes otherwise Nantukett Together with all the lands Islands Soyles Rivers Harbours Mynes Mineralls Quarries Woods Marishes

Waters Lakes ffishings hawking hunting and ffowleing and all other Royalties proffitts Comodities and hereditaments to the said severall Islands lands and premisses belonging and appertaineing with their and every of their appurtennes AND all our Estate right title interest benefitt advantage Clayme and demaund of in or (to) the said lands and premisses or any part or parcell thereof AND the Revercon and Revercons Remaynder and Remaynders together with the yearely and other the Rents Revenues and proffitts of all and singuler the said premisses and of every part and parcel thereof TO HAVE AND TO HOLD All and singuler the said lands Islands hereditaments and premisses with their and every of their appurtennes hereby given and Graunted (or herein before menconed to bee given and granted) unto our said dearest Brother James Duke of Yorke his heires and Assignes for ever To the only proper use and behoofe of the said James Duke of Yorke his heires and Assignes for ever To bee holden of us our heires and Successors as of our Manor of East Greenwich in our County of Kent in ffree and Comon Soccage and not in Capite or by Knights Service YEILDING AND RENDERING And the said James Duke of Yorke Doth for himselfe his heirs and Assignes covenant and promise to yeild and Render unto us our heires and Successors of and for the same yearely and every yeare ffortie Beaver Skynns when they shall bee demanded or within Nynety days after AND WE DOE FURTHER of our especiall grace certaine knowledge and meere mocon for us our heires and Successors give and Graunt unto our said dearest Brother James Duke of Yorke his heires Deputyes Agents Comissioners and Assignes by these presents full and absolute power and authority to Correct punish Pardon Governe and Rule all such the Subjects of us our heires and Successors as shall from tyme to tyme Adventure themselves into any the parts or Places aforesaid or that shall or doe att any tyme hereafter Inhabite within the same according to such Lawes Orders Ordinances direccons and Instruments as by our said dearest Brother or his Assignes shall bee established And in defect thereof in Cases of necessitie according to the good discreccons of his Deputyes Comissioners Officers or Assignes respectively

as well in all Causes and matters Capitall and Criminall as Civill both Marine and others SOE ALLWAYES as the said Statutes Ordinances and Proceedings bee not contrary to but as neare as conveniently may bee agreeable to the Lawes Statutes and Governement of this our Realme of England AND SAVEING and reserveing to us our heirs and Successors the receiveing heareing and determineing of the Appeale and Appeales of all or any Person or Persons of in or belonging to the Territories or Islands aforesaid in or touching any Judgment or Sentence to bee there made or given AND FURTHER that it shall and may bee lawfull to and for our said dearest Brother his heires and Assignes by these presents from tyme to tyme to Nominate make Constitute Ordeyne and Confirme by such Name or Names Stile or Stiles as to him or them shall seeme good and likewise to revoke discharge Change and alter as well all and singuler Governors Officers and Ministers which hereafter shall bee by him or them thought fitt and needfull to bee made or used within the aforesaid Parts and Islands and alsoe to make Ordayne and Establish all manner of Orders Lawes direccons Instruccons formes and Ceremonies of Government and Magistracy fitt and necessary for and concerneing the Government of the Territories and Islands aforesaid soe allwayes as the same bee not contrary to the Lawes and Statutes of this our Realme of England butt as neare as may bee agreeable thereunto And the same att all tymes hereafter to putt in Execucon or abrogate revoke or change not only within the Precincts of the said Territories or Islands butt alsoe upon the Seas in goeing and comeing to and from the same as hee or they in their good discreccons shall thinke to bee fittest for the good of the Adventurers and Inhabitants there AND WE DOE FURTHER of our especiall grace certaine knowledge and meere mocon Graunt Ordeyne and Declare That such Governors Officers and Ministers as from tyme to tyme shall bee authorized and appointed in manner and forme aforesaid shall and may have full power and authority to use and exercise Marshall lawe in cases of Rebellion Insurreccon and Mutiny in as large and ample manner as our Leiftennants in our Countyes within Our Realme of England have or ought to have

by force of their Comission of Leiutennancy or any lawe or Statute of this our Realme AND WEE DOE further by these presents for us our heires and Successors Graunt unto our said dearest Brother James Duke of Yorke his heires and Assignes that itt shall and may bee lawful to and for the said James Duke of Yorke his heires and Assignes in his or their discreccons from tyme to tyme to Admitt such and soe many Person and Persons to Trade and Traffique unto and within the Territoryes and Islands aforesaid and into every or any part and parcell thereof And to have possesse and enioye any lands or hereditaments in the parts and Places aforesaid as they shall thinke fitt according to the Lawes Orders Constitucons and Ordinances by our said Brother his heires Deputyes Comissioners and Assignes from tyme to tyme to bee made and established by virtue of and according to the true intent and meaneing of these presents and under such Condicons reservacons and Agreements as our said Brother his heires or Assignes shall sett downe Order direct and appoint and not otherwise as aforesaid AND WEE DOE FURTHER of our especiall grace certaine knowledge and meere mocon for us our heirs and Successors give and Graunt to our said deare Brother his heires and Assignes by these presents that itt shall and may bee lawfull to and for him them or any of them att all and every tyme and tymes hereafter out of any Our Realmes or Dominions whatsoever to take lead Carry and Transport in and into (their) Voyages and for and towards the Plantacon of our said Territoryes and Islands all such and soe many of our loveing Subjects or any other Strangers being not prohibited or under restraint that will become our loveing Subjects and live under our Allegiance as shall willingly Accompany them in the said Voyages Together with all such Cloathing Implements ffurniture and other things usually transported and not Prohibited as shall bee necessary for the Inhabitants of the said Islands and Territoryes and for their use and defence thereof and maunaging and Carrying on the Trade with the People there and in passing and returneing to and fro YEILDING AND PAYING to us our heires and Successors the Customes and Duties therefore due and payable according to the lawes and Customes

of this our Realme AND WEE DOE alsoe for us our heires and Successors, Graunt to our said dearest Brother James Duke of Yorke his heires and Assignes and to all and every such Governor or Governors or other Officers or Ministers as by our said Brother his heires or Assignes shall bee appointed to have power and Authority of Governement and Comaund in or over the inhabitants of the said Territories or Islands that they and every of them shall and lawfully may from tyme to tyme and att all tymes hereafter for ever for their severall defence and safety encounter expulse repell and resist by force of Armes as well by Sea as by land and all wayes and meanes whatsoever all such Person and Persons as without the speciall Lycence of our said deare Brother his heires or Assignes shall attempt to inhabite within the severall Precincts and Lymitts of our said Territories and Islands AND ALSOE all and every such Person and Persons whatsoever as shall enterprize or attempt att any tyme hereafter the distruccon Invasion detriment or annoyance to the Parts Places or Islands aforesaid or any part thereof AND LASTLY OUR WILL and pleasure is and wee doe hereby declare and Graunt that these our Letters Pattents or the Inrollment thereof shall bee good and effectuall in the Law to all intents and purposes whatsoever NOTWITHSTANDING the not reciteing or menconing of the premisses or any part thereof or the Meets or Bounds thereof or of any former or other Letters Patents or Graunts heretofore made or Graunted of the premisses or of any part thereof by us or of any of our Progenitors unto any other Person or Persons whatsoever Bodyes Politique or Corporate or any Act Lawe or other Restraint incertainty or ymperfeccon whatsoever to the contrary in any wise notwithstanding ALTHOUGH EXPRESSE MENCON of the true yearely value or certainty of the premisses or of any of them or of any other Guifts or Graunts by us or by any of our Progenitors or Predecessors heretofore made to the said James Duke of Yorke in these presents is not made or any Statute Act Ordinance Provision Proclamacon or Restriccon heretofore had made Enacted Ordeyned or provided or any other matter Cause or thing whatsoever to the contrary thereof in any wise notwithstanding IN WITTNES

whereof Wee have caused these our Letters to bee made Patents WITTNES our Selfe att Westminster the Twelveth day of March in the Sixteenth yeare of our Raigne

By the King HOWARD*

* This Patent is framed and hangs in the State Library at Albany. It is recorded in Liber I., Patents, p. 139, Secretary of State's office, Albany, N. Y. It is very neatly printed in the admirable series of State documents contained in the official publications (Doc. rel. to Col. Hist. of N. Y., II., 295), and in the "Report of the Regents of the University on the Boundaries of the State of New York," I., 10.

The second Patent, or that of 1674 (*supra*, p. 16), given by King Charles II. to the Duke of York after the Treaty of Westminster, is printed in Leaming and Spicer's New-Jersey Grants, p. 41, and extracts are contained in the "Report of the Regents on the Boundaries" (*ibid.*, *supra*), p. 21.

A brief discussion concerning those who may lawfully hold lands in the State of New York, and of the imperfect *status* of the Indians, seemed best relegated to the end of this volume.

It will be observed that by law all citizens of the United States, no matter where resident, are entitled to take and hold lands in the different States of the Union,[1] a fact of tremendous significance in the future of landed property in this country. The disabilities of an alien to hold lands did not originate in the feudal law, but grew up at a later period, when the ideas of national existence and the theories relative to the State had already triumphed over purely feudal conceptions of sovereignty.[2]

In Calvin's Case[3] it was extremely well argued that a Scot, born in Scotland after the Crown of England had descended to James I., was disabled to bring any real action within the realm of England, the "ligeance" of each kingdom being separate and distinct. But the courts, after a very profound consideration, held otherwise. Thus it was always the law of the different American plantations of England, whether they were colonies or provinces of the Crown, that the subjects of a common king were not aliens *inter se*, and, consequently, a citizen of the colony of Massachusetts Bay, or of Rhode Island and the Providence plantations, or of Virginia, might take and hold lands here as freely as if he were born within this province.

The continuation of this *ante bellum* privilege, at once so extensive and so advantageous, was naturally insisted on at the time of the first formal confederation of the colonies. When independence was achieved, and it became essential to remodel the general government more in conformity with the natural partition of the ancient and subverted powers, both imperial and local, we find the same influential privilege anchored, as it were, to the very body of the final constitution of government. Thus this great and extensive privilege, peculiar to permanent and vast empires, is fortunately now an inseparable incident of the *status* of a citizen of the United States.[4]

[1] P. 186, *infra*. [2] *Supra*, p. 102. [3] 7 Rep. 1. [4] Appendix No. II., *infra*.

APPENDIX NO. II.

OF THE PERSONS CAPABLE OF HOLDING AND CONVEYING LANDS.[1]

Citizens of the United States.

THE Revised Statutes declare that "Every citizen of the United States is capable of holding lands in New York, and of taking the same by descent, devise, or purchase."[2] This was merely declaratory of a right embodied in the Federal Constitution.[3] Prior to Independence a naturalized or a native-born citizen of any colony could take and hold lands in other of the Crown dominions, for he was a subject of the common King, and his *status* related to the empire and not to any particular territory within the empire. The Articles of Confederation perpetuated this right or capacity.[4] Thence it passed into the National or Federal Constitution and became fundamental or organic.[5] The federal law for the purposes, at least, of the real property lawyer must now determine who are citizens of the United States.[6] Citizens of the United States may for such purposes be classed as (1) those who were citizens of any State at the time of the adoption of the Federal Constitution;[7] (2) all persons born in the United States and not subject to any foreign power, excluding Indians not taxed;[8]

[1] 1 R. S. 719, Art. II., Tit. 1, c. 1, Part II.

[2] 1 R. S. 719, sec. 8. [3] Art. IV., sec. 2. [4] Art. IV.

[5] Const. of U. S., Art. IV., sec. 2; 2 Story on Const., sec. 1806; Lynch *v.* Clarke, 1 Sandf. Ch. 583–645.

[6] Ludlam *v.* Ludlam, 26 N. Y. 356, 360; Comitis *v.* Parkerson, 56 Fed. R. 556.

[7] *Ut supra*, p. 76; Lynch *v.* Clarke, 1 Sandf. Ch. 583, 645; Minor *v.* Happersett, 21 Wall. 162, 167.

[8] U. S. R. S., sec. 1992; Fourteenth Amendment to Constitution of U. S.; Slaughter House Cases, 16 Wall. 36, 72; U. S. R. S., sec. 2172; *in re* Look Tin Sing, 21 Fed. R. 905.

(3) all those free whites and Africans whom the sovereignty of the United States has clothed with citizenship by naturalization and subject to the jurisdiction thereof.[1] Since the year 1790 the Federal Government has, under the Federal Constitution, the exclusive power of naturalization. Consequently the States cannot now make an alien "a citizen of the United States," the delegated power to that end being exclusive when it has once been exercised by Congress.[2] By act of Congress of February 10th, 1885,[3] an alien woman, possessing the capacity for citizenship, intermarrying with a citizen of the United States, either here or abroad, becomes a citizen, no matter where she may reside;[4] but the converse—that a citizen woman by marriage with an alien becomes an alien—is not to be inferred from this statute.[5] The *status* of an alien or of a citizen being once fixed is presumed (except in the case of deserters) to continue until the contrary be shown.[6] But foreign birth is not conclusive of alienage, for although children of citizen parents (or of a citizen father in some cases) are born out of the limits and the jurisdiction of the United States, they are to be considered as citizens of the United States.[7] Nor is birth within the United States conclusive of the *status* of a citizen, for the legitimate children of diplomatic or consular alien personages, although born here, are not there-

[1] Fourteenth Am'd't Cons't of U. S.; Boyd *v.* Thayer, 143 U. S. 135; U. S. R. S., sec. 2169.

[2] Const. of U. S., Art. I., sec. 8; Golden *v.* Prince, 3 Wash. C. Ct. 314; Lynch *v.* Clarke, 1 Sandf. Ch. 583, 645; U. S. R. S., sections 2165, 2174; cf. 29 Amer. Law Rev. 52 on "Continuous Residence" of alien.

[3] U. S. R. S., sec. 1994; Ware *v.* Wisner, 50 Fed. R. 310; Ludlam *v.* Ludlam, 26 N. Y. 356; Luhrs *v.* Eimer, 80 N. Y. 171; Wainwright *v.* Low, 132 N. Y. 313; Halsey *v.* Beer, 52 Hun, 366.

[4] Halsey *v.* Beer, 52 Hun, 366; Kelly *v.* Owen, 7 Wall. 496.

[5] Comitis *v.* Parkerson, 56 Fed. R. 556; cf. Wadsworth *v.* Wadsworth, 12 N. Y. 376.

[6] Hauenstein *v.* Lynham, 100 U. S. 483; Charles Green's Son *v.* Salas, 31 Fed. R. 106; but see Boyd *v.* Thayer, 143 U. S. 135 as to what proof will rebut presumption. See as to deserters U. S. R. S., sections 1996, 1997 and 1998 (and see N. Y. Laws of 1872, c. 120), for exceptions to the rule.

[7] U. S. R. S., sections 1993, 2172; U. S. *v.* Gordon, 5 Blatch. 18; Ware *v.* Wisner, 50 Fed. R. 310; Lynch *v.* Clarke, 1 Sandf. Ch. 583; Opinions Att'y Gen'l U. S., X., 329; cf. Laws of N. Y. 1889, c. 42, as to capacity of children of a native woman to take real estate.

fore citizens, for they are in legal contemplation born exterritorially or within the allegiance or diplomatic jurisdiction of the sovereign represented by the parent.[1] So the children of alien tourists or of commercial agents, *animo revertendi domum*, are to some extent exceptions to the universality of the rule indicated—that American birth confers the *status* of a citizen of the United States.[2] There are now but two sources of citizenship in the United States, birth and naturalization ;[3] and the latter is limited in application to free white persons or to those of African nativity or descent. The general naturalization laws have no application to Mongolians or to those of half white and half Indian blood.[4] In the absence of any law of the United States governing the particular case, the common law is in New York to determine, irrespective of English statutes, whether or not one is an alien or a citizen of the United States.[5] But as naturalization is a judicial act of record, it can only be proven by the record,[6] and not by parol.[7] The naturalization of an alien already married, however, operates to naturalize his alien wife[8] and minor children.[9]

Expatriation.

The common law led to harsh doctrines concerning perpetual allegiance,[10] which were deemed somewhat inconsistent with the liberal naturalization accorded to aliens by

[1] Lynch *v.* Clarke, 1 Sandf. Ch. 583, 658 ; *in re* Look Tin Sing, 21 Fed. R. 905.

[2] Cf. Opin. Att'y Gen'l U. S., X., 328.

[3] Elk *v.* Wilkins, 112 U. S. 94, 101.

[4] U. S. R. S., sec. 2169 ; *re* Ah Yup, 5 Sawyer, 155 ; *re* Camille, 6 Sawyer, 541. Indians are now naturalized by special laws. Elk *v.* Wilkins, 112 U. S. 94, 103.

[5] Ludlam *v.* Ludlam, 26 N. Y. 356 ; and see also Lynch *v.* Clarke on this point, 1 Sandf. Ch. 583.

[6] Charles Green's Sons *v.* Salas, 31 Fed. R. 106.

[7] See, however, Boyd *v.* Thayer, 143 U. S. 135 ; McCarthy *v.* Marsh, 5 N. Y. 263, 284.

[8] Burton *v.* Burton, 1 Keyes, 359 ; Kelly *v.* Owen, 7 Wall. 496.

[9] People *v.* Newell, 38 Hun, 78 ; U. S. R. S., sec. 2172.

[10] Kent's Com. II., 49 ; Story Const., sec. 1104, n. 1 ; Opin. Att'y Gen'l U. S., viii., 157 ; Wharton Conf. of Laws, chap. I. ; Ludlam *v.* Ludlam, 26 N. Y. 356, 373.

this country. In the year 1868 Congress set the matter at rest by an explicit declaration in favor of the natural and inherent right of all people to expatriate themselves.[1] This declaration ought logically to extend to citizens of the United States.[2] As the federal authority alone can make a citizen of the United States by process of naturalization, its conclusions as to what constitutes "expatriation" of its own citizen will be paramount to any determination of a State tribunal.[3]

Disabilities of Aliens.

All persons [excluding Indians not taxed[4]] who are not citizens of the United States are aliens, and in New York are subject to certain disabilities in respect of lands. Such disabilities originate in the common law, and are due to the authority given the common law by the Constitutions of the State.[5] But as the Legislature has the reserve power to alter such common law, it has in many particulars now modified the ancient disabilities of aliens. At common law there were but two modes of acquiring title to real property, by "purchase" and by "descent,"[6] which last is by operation of law. "Descent" refers alone to a succession *ab intestato*;[7] purchase is in law a generic term, and includes every mode (except descent) by which a title to lands is transmitted from one person to another. An acquisition by an alien through purchase was never void at the common law,[8] but only a cause of forfeiture to the Crown. Had the transfer been void it might often have defeated such forfeitures. Forfeitures on this ground were not of feudal origin, but grew out of a more extended polity designed to encourage national strength and well-being.[9] After Inde-

[1] U. S. R. S., sec. 1999; Charles Green's Sons *v.* Salas, 31 Fed. R. 106.

[2] See, however, Comitis *v.* Parkerson, 56 Fed. R. 556; Opin. Att'y Gen'l N. Y. for 1868, p. 380.

[3] Comitis *v.* Parkerson, 56 Fed. R. 556. [4] U. S. R. S., sec. 1992.

[5] Const. 1777, sec. xxxv.; Const. 1822, Art. VII., sec. 13; Const. 1846, Art. I., sec. 17; Const. 1894–5, Art. I., sec. 16; Ludlam *v.* Ludlam, 26 N. Y. 356; cf. 1 R. S. 720, sec. 17, and Wright *v.* Saddler, 20 N. Y. 320.

[6] Stamm *v.* Bostwick, 122 N. Y. 48, 51.

[7] Jackson *v.* Lunn, 3 Johns. Cas. 109, 121.

[8] 2 Bla. Com., 293; Craig *v.* Leslie, 3 Wheat. 563, 588.

[9] 2 Bla. Com., 249, 252; *supra*, p. 102.

pendence the State having succeeded to all the seigniorial and prerogatival rights of the Crown maintained its prerogative of escheats or forfeitures in socage lands, both by authority of the statute and by the common law.[1] In respect of those lands granted under the great seal of the State, and made alodial by the statute of 1787,[2] the statute law provided for escheats on the owner's conviction of treason,[3] or by reason of felony,[4] or on the death of the last owner without right heirs.[5] Socage lands, and by analogy alodial lands, could not pass to an alien by operation of law, for the common law took no notice of an alien.[6] For the same reason an alien could not take by curtesy or dower, for they were estates created by act of the law.[7] As an alien had no inheritable blood no one could deduce title by descent through such alien ;[8] but this rule did not impede descents between citizen sons of an alien father,[9] or between the sons' surviving descendants [10] as such. But a nephew could not inherit from his uncle if his father was an alien.[11]

The legal title of an alien acquired by purchase (which includes devise) was recognized by the common law, and he could maintain an action to protect it.[12] The estate was

[1] Jackson *v.* Lunn, 3 Johns. Cas. 109 ; *et ut supra*, pp. 76, 100 ; and see 2 J. & V. 243, sec. vi. ; cf. 1 R. L. 495.

[2] 2 J. & V. 67, sec. vi.

[3] 2 J. & V. 55, 57.

[4] 2 J. & V. 242.

[5] 1 R. L. 379.

[6] 11 & 12 W. III., c. 6 ; *supra*, p. 85 ; Orr *v.* Hodgson, 4 Wheat. 453 ; Lessee of Levy *v.* M'Cartee, 6 Pet. 102 ; Jackson *v.* Green, 7 Wend. 333 ; Jackson *v.* Jackson, 7 Johns. 214 ; Orser *v.* Hoag, 3 Hill, 79 ; McLean *v.* Swanton, 13 N. Y. 535 ; Luhrs *v.* Eimer, 80 N. Y. 171.

[7] Jackson *v.* Lunn, 3 Johns. Cas. 109 ; Jackson *v.* Fitzsimmons, 10 Wend. 9, 16 ; Mick *v.* Mick, 10 Wend. 379 ; Conolly *v.* Smith, 21 Wend. 59.

[8] Levy *v.* M'Cartee, 6 Pet. 102 ; Jackson *v.* Green, 7 Wend. 333 ; Jackson *v.* Fitzsimmons, 10 Wend. 9 ; note to Leggett *v.* Dubois, 5 Pai. 114, 117.

[9] 2 Bl. Com. 250 ; Jackson *v.* Green, 7 Wend. 333 ; McGregor *v.* Comstock, 3 N. Y. 408 ; Luhrs *v.* Eimer, 80 N. Y. 171 ; McLean *v.* Swanton, 13 N. Y. 535, 542 ; Renner *v.* Muller, 44 Sup'r Ct., xi. J. & S. 535.

[10] McGregor *v.* Comstock, 3 N. Y. 408 ; Banks *v.* Walker, 3 Barb. Ch. 438 ; McLean *v.* Swanton, 13 N. Y. 535, 542.

[11] Lessee of Levy *v.* M'Cartee, 6 Peters, 102 ; cf. Jackson *v.* Green, 7 Wend. 333 ; Redpath *v.* Rich, 3 Sandf. 79 ; Jackson *v.* Fitzsimmons, 10 Wend. 9.

[12] And so a resident alien may now do ; Nolan *v.* Command, 11 N. Y. Civ. Pro. R. 295.

vested in him, to every purpose, until office found,[1] and could be conveyed by him subject to being divested on the recording of the inquisition.[2] The Revised Statutes changed this last rule of the common law and made all devises to an alien living at the time of the death of testator void;[3] directing that the interest so devised should descend to the testator's heirs, and if there be no such competent to take, that it should then pass under his will to the residuary devisees, if any there were.[4] This provision was an augmentation rather than a diminution of the common law disabilities of an alien.[5] It was soon, however, changed by statute,[6] so as to enable a resident alien to devise lands, and a resident alien devisee to take and hold lands on filing a deposition of an intention to become a citizen, as provided in the Revised Statutes.[7] By a recent act, any alien, no matter where resident, may now take by devise (hold, enjoy, convey, and transmit by devise) real estate from a citizen of the United States.[8] An alien woman, resident of this State, was already capable of taking by devise from her husband or other person capable of devising any real estate; and she might execute any power in respect to such real estate.[9] So the foreign-born children and descendants of a native-born woman may have, convey, and devise real estate in this State,

[1] Jackson *v.* Lunn, 3 Johns. Cas. 109; People *v.* Conklin, 2 Hill, 67; Munro *v.* Merchant, 28 N. Y. 9; Goodrich *v.* Russell, 42 N. Y. 177; Wright *v.* Saddler, 20 N. Y. 320, 328; Wadsworth *v.* Wadsworth, 12 N. Y. 376.

[2] Griffith *v.* Pritchard, 5 B. & Ad. 765, 780.

[3] Wadsworth *v.* Wadsworth, 12 N. Y. 376; Mick *v.* Mick, 10 Wend. 379.

[4] 2 R. S. 57, sec. 4; Mick *v.* Mick, 10 Wend. 379; Downing *v.* Marshall, 23 N. Y. 366, 375; Beekman *v.* Bonsor, 23 N. Y. 298, 316.

[5] Wadsworth *v.* Wadsworth, 12 N. Y. 376; Marx *v.* McGlynn, 88 N. Y. 357, 376.

[6] C. 115, Laws of 1845; amended c. 261, Laws of 1874; c. 38, Laws of 1875; c. 115, Laws of 1845, confirmed devises theretofore made by an alien to a citizen or to capable resident alien.

[7] 1 R. S. 720, sec. 15; Hall *v.* Hall, 81 N. Y. 130; cf. Marx *v.* McGlynn, 88 N. Y. at p. 376; the power to take depends now on this statute; the power to hold as against the State on a compliance with the statute; Hall *v.* Hall, *id. sup.*

[8] C. 207, Laws of 1893.

[9] Laws of 1845, c. 115; cf. Laws of 1872, c. 120, as to woman born here, but marrying alien and residing abroad; and U. S. R. S., sec. 1994.

if derived from their mother or a citizen ancestor, notwithstanding her possible expatriation by an intermarriage with an alien and residence abroad.[1]

Statutory Removal of such Disabilities.

We have already noticed the statute law touching devises to aliens. Prior to the Revised Statutes, which superseded all general laws, the legislation affecting the common law disabilities of aliens was of a twofold character: 1. Quieting the titles of those who then held lands deduced from English subjects or other aliens.[2] 2. Enabling actual settlers or alien friends to take and hold lands, and in certain cases to transmit title thereto.[3] By such legislation aliens were empowered to take indefinitely by devise or by descent from such aliens as were then lawfully seised, but not otherwise. Having thus acquired title, they might continue to hold the lands so transmitted until such lands finally came into the hands of a citizen.[4] These acts were, however, limited in application, and are only cursorily noticed.

The Revised Statutes first provided that no person capable of inheriting should be precluded from such inheritance by reason of the alienism of any ancestor.[5] The revisers intended thus to change what they call a harsh rule of existing law.[6] The common law had in England been changed in this respect by the Act 11 & 12 W. III., c. 6, which was no part of the law of New York,[7] at least after the general repealing act of 1788.[8] This new provision

[1] C. 42, Laws of 1889; *infra*, p. 196.

[2] Law of Feb. 28, 1789, c. 42; 2 Greenleaf, 279; c. 297, Laws of 1826; Law of April 4, 1807, c. 123.

[3] C. 72, Laws of 1798, construed in c. 25, Laws of 1819; Law of 26 March, 1802, c. 49; c. 109, Laws of 1804; c. 25, Laws of 1805; c. 123, Laws of 1807; c. 175, Laws of 1808; the five last-mentioned acts are in 2 R. L. 541–544; c. 307, Laws of 1825; c. 171, Laws of 1830; c. 87, Laws of 1843.

[4] Duke of Cumberland *v.* Graves, 7 N. Y. 305; People *v.* Snyder, 41 N. Y. 397; Howard *v.* Moot, 64 N. Y. 262; Watson *v.* Donnelly, 28 Barb. 653.

[5] 1 R. S. 754, sec. 22; Lynch *v.* Clarke, 1 Sandf. Ch. 583, 637.

[6] Revisers' notes to c. II., Part II., R. S.

[7] Jackson *v.* Green, 7 Wend. 333; Levy *v.* M'Cartee, 6 Pet. 102, 109.

[8] *Supra*, p. 77.

of the Revised Statutes was held prospective in operation,[1] and the word "ancestor" has been construed as embracing not only those who were lineal, but those also who were collateral.[2] The section refers to estates derived *ex parte materna*, as well as to those derived through the father, or *ex parte paterna*. While this section permitted citizens thereafter to inherit, notwithstanding that they might deduce their title through an alien ancestor,[3] yet it did not change the course of descents in New York, so as to enable one not an heir-at-law to succeed as such in the room of one living but debarred by alienage only. Thus, where a decedent left surviving a sister who was an alien, and her daughter, who was a citizen, it was held that the niece could not inherit.[4] But this rule is now changed.[5] The Revised Statutes also protected the titles of citizens in possession on or before April 21st, 1825,[6] consolidating several acts of the Legislature to the effect that such titles should not be questioned or impeached by reason of the alienism of any person through whom such titles were deduced.[7] Several acts of like import have since been passed [8] referring the protection to later dates. Aliens seised of real estate which by special laws they are permitted to hold and dispose of are empowered by the Revised Statutes to take back mortgages thereon and enforce the same, and if necessary to repurchase and hold the lands mortgaged.[9] This provision was not new to the statute book.[10] There is now no other special authority in New York enabling aliens to take and enforce a conveyance of lands by way of mortgage; excepting in the case of those aliens who have filed a deposition or declaration in writing of intention to become a citizen of the United States.[11] But if other aliens should take

[1] Redpath *v.* Rich, 3 Sandf. 79.
[2] McCarthy *v.* Marsh, 5 N. Y. 263.
[3] *Ibid.*
[4] McLean *v.* Swanton, 13 N. Y. 535.
[5] C. 207, Laws of 1893. [6] 1 R. S. 719, sec. 9. [7] 2 R. L. 542, 543.
[8] C. 171, Laws of 1830; c. 115, Laws of 1845; c. 576, Laws of 1857; c. 513, Laws of 1868; c. 141, Laws of 1872; c. 358, Laws of 1872; c. 261, Laws of 1874, sec. 2; c. 336, Laws of 1875; c. 111, Laws of 1877.
[9] 1 R. S. 721, sec. 19.
[10] Cf. 2 R. L., 541. [11] *Infra*, p. 195.

a mortgage, as it now is only a security, the common law is irrelevant.[1]

The Revised Statutes, consolidating an act of 1825,[2] empowered any alien inhabitant of New York (who should declare his intention to become a citizen of the United States as prescribed by the statute) to take and hold lands by purchase, and within six years thereafter to sell, assign, mortgage, devise, or dispose of the same excepting by demise.[3] In 1834 this provision was extended so as to embrace aliens coming into the United States to reside.[4] This license to alien inhabitants of the United States was not retroactive, so as to enable them to hold lands acquired before the filing of the declaration[5] or deposition as against the State.[6] In 1845 a demise theretofore made by an alien to a citizen of the United States or to an alien capable of taking and holding real estate was made valid.[7] In the same year[8] the law touching declarations by aliens intending citizenship was so amended as to make the filing of such declarations operate retrospectively, or on property granted, devised, or conveyed to such aliens prior to the filing of such declarations by them.[9] At common law a completed naturalization operated to bar an escheat at any time before office found in the case of property acquired by purchase.[10] The act of 1845 extended this same effect to the very inception of the judicial process of naturalization.[11]

At common law no descent was cast on an alien, nor had an alien inheritable blood.[12] The Revised Statutes consoli-

[1] Ludlow *v.* Van Ness, 8 Bosw. 178.

[2] C. 307, Laws of 1825, p. 427; Wright *v.* Saddler, 20 N. Y. 320.

[3] 1 R. S. 720, sections 15 and 16; amended c. 272, Laws of 1834; cf. sec. 9, c. 115, Laws of 1845.

[4] C. 272, Laws of 1834.

[5] 1 R. S. 720, sec. 17; Heney *v.* The Brooklyn Benevolent Society, 39 N. Y. 333.

[6] Goodrich *v.* Russell, 42 N. Y. 177.

[7] C. 115, sec. 9, Laws of 1845.

[8] C. 115, Laws of 1845; amended c. 576, Laws of 1857.

[9] Goodrich *v.* Russell, 42 N. Y. 177; Hall *v.* Hall, 81 N. Y. 130.

[10] Jackson *v.* Beach, 1 Johns. Cas. 399; People *v.* Conklin, 2 Hill, 67; Jackson *v.* Green, 7 Wend. 333, 335.

[11] C. 115, Laws of 1845, the denizen paying the accrued costs of the State.

[12] Goodrich *v.* Russell, 42 N. Y. 177, 181.

dating prior acts of the Legislature [1] regulated descent from aliens who should file declarations or depositions of an intention to become citizens, in case the declarants died within six years after the making and filing of such deposition intestate, leaving heirs inhabitants of the United States. Such heirs were empowered to take as if such aliens had died in the full possession of citizenship.[2] In the year 1845 the Legislature made important amendments and alterations of the law respecting aliens,[3] *inter alia* enabling aliens to inherit those lands acquired by purchase by resident aliens dying seised of such property.[4] This act failed to remove the incapacity of aliens to take by descent from either naturalized citizens or native citizens.[5] This omission was supplied by a statute [6] enabling alien kindred to take by descent from both naturalized and native-born citizens. But under the act of 1845 and its amendments, if such alien heirs were males of full age they were required to take steps to be naturalized before they could hold the lands as against the State.[7] None of these acts enabled aliens to take those lands acquired by an alien by descent. Nor did they enable aliens to take as the representatives of non-resident aliens.[8] A recent act, however, enables alien kindred of a citizen to take by descent, even though such aliens may deduce their title through a non-resident alien ancestor.[9] This last statute appears to have removed the disability which proved fatal to the plaintiff in Branagh *v.* Smith.

The children and descendants of a woman born in the United States, or a citizen thereof, are given inheritable

[1] C. 297, Laws of 1826, p. 348; c. 5, Laws of 1827, passed Nov. 26.

[2] 1 R. S. 720, sec. 18.

[3] C. 115, Laws of 1845.

[4] Ettenheimer *v.* Heffernan, 66 Barb. 374; Goodrich *v.* Russell, 42 N. Y. 177; Stamm *v.* Bostwick, 122 N. Y. 48; Wainwright *v.* Low, 132 N. Y. 317.

[5] Luhrs *v.* Eimer, 80 N. Y. 171.

[6] C. 261, Laws of 1874; Wainwright *v.* Low, 132 N. Y. 313.

[7] C. 115, Laws of 1845; as amended c. 261, Laws of 1874, and c. 38, Laws of 1875; Goodrich *v.* Russell, 42 N. Y. 177; Dusenburry *v.* Dawson, 9 Hun, 511.

[8] Branagh *v.* Smith, 46 Fed. R. 517.

[9] C. 207, Laws of 1893.

blood, and take by descent from her, even though such woman marry an alien and reside abroad.[1] An act of 1889 extends this capacity and enables the foreign-born children and descendants of a native woman to take, hold, convey, and devise real estate derived from an ancestor who was a citizen with the same effect as if they were citizens of the United States, notwithstanding such native-born woman married an alien and resided abroad.[2]

Alien wives of citizens of the United States, or of alien residents seised of real estate, were after 1845 entitled to dower in the lands of their husbands, and so the law now is.[3] But an alien husband of a citizen woman will not have his tenancy by the curtesy, for there is no modification of the common law in that respect.

An alien woman resident in this State may take lands by way of marriage settlement or by devise of her husband or other person capable of devising real estate.[4]

While the State frequently surrenders its rights in the property of aliens, such a surrender cannot operate to defeat vested rights.[5]

Trusts for Aliens.

If lands be devised to citizens on active trusts for aliens only, the trusts are not necessarily invalid, as the trustees have capacity to take and hold the legal title.[6] So conveyances in trust for aliens may be enforced in equity at the suit of the alien beneficiary.[7] But where an alien for the purpose of evading the law purchases lands and takes a conveyance in the name of a third person without any declaration of trust, it has been held that a resulting trust will not arise in favor of such purchaser.[8] Where an alien

[1] C. 120, Laws of 1872; cf. U. S. R. S., sec. 2172; *et supra*, p. 192.

[2] C. 42, Laws of 1889. [3] C. 115, Laws of 1845.

[4] C. 115, Laws of 1845, sec. 8.

[5] Luhrs *v.* Eimer, 80 N. Y. 171, 180; Wainwright *v.* Low, 132 N. Y. 313.

[6] Marx *v.* McGlynn, 88 N. Y. 357, 376; Meakings *v.* Cromwell, 5 N. Y. 136; cf. Beekman *v.* Bonsor, 23 N. Y. 298, 316.

[7] Anstice *v.* Brown, 6 Pai. 448; Craig *v.* Leslie, 3 Wheat. 563; Marx *v.* McGlynn, *id supra*.

[8] Legett *v.* Dubois, 5 Pai. 114; cf. Ludlow *v.* Van Ness, 8 Bosw. 178. This would be so in the case of a citizen under the Revised Statutes; *supra*, p. 140.

has capacity to hold lands, he may hold them in trust as well as for his own use.[1]

Treaties.

The disabilities of aliens are often relieved by treaty. As the power to make a treaty is lodged in the Federal Government, that government takes by implication an authority to suspend the action of such State laws as conflict with the treaty.[2] The treaty is ineffectual unless it become the supreme law of the land.[3] When a treaty regulates the *status* of aliens, it is equivalent to a personal law, exempting such aliens from the operation of the ordinary law governing the case of other aliens. Such treaties usually subject the favored aliens to the common rules regulating the person or property of citizens. The constitutional power of the United States to enter into a treaty which in effect changes or abrogates the law of a State in respect of certain real property is fully affirmed.[4] It is often necessary to consult the treaties in a matter relating to the succession to property of aliens dying intestate. The discussion of the treaties themselves is beyond the scope of this essay.

[1] Duke of Cumberland *v.* Graves, 7 N. Y. 305; 9 Barb. 595.

[2] For a general discussion of this subject, consult Prof. Bernheim's "History of the Law of Aliens," pp. 148, *et seq.*

[3] Kull *v.* Kull, 37 Hun, 476, 478, and cases cited.

[4] Hauenstein *v.* Lynham, 100 U. S. 483; Geofroy *v.* Riggs, 133 U. S. 258; Opin. U. S. Att'y Gen'l, VIII., 411; Wheaton's Internat. Law, 139; Halleck's Internat. Law, 157; Kent's Com., IV., 420; Wharton's Amer. Law, sec. 261.

APPENDIX NO. III.

Indians.

THE modern law relating to the American Indians is almost a deduction from the early principles acted on by Europeans in the sixteenth and seventeenth centuries.[1] In most particulars the capacity of the Indians in respect of real property remains a very limited one. They still occupy a peculiar status. They do not belong to an independent nation,[2] yet they are not aliens.[3] Although born within the jurisdiction of the United States and subject to no foreign power, they are not citizens of the State,[4] or of the United States within the meaning of the fourteenth amendment, unless they separate from their tribal relations and pay a tax to the support of government—State, municipal, or federal.[5] This imperfect *status* is the result of certain doctrines laid down at the first occupation of this country by Europeans,[6] who never accorded to the natives the rights which *jura belli* give even to conquered nations. There was said to be no "conquest" in the European sense of this term.[7] Their tribal governments were given a sort of corporate recognition,[8] but such a recognition as wholly subordinated them to the operations and regulations of the

[1] *Supra*, p. 8.
[2] Cherokee Nation *v.* Georgia, 5 Pet. 1.
[3] *Ibid.*; Jackson *ex dem. v.* Wood, 7 Johns. 290, 295; Goodell *v.* Jackson, 20 Johns. 693.
[4] People *v.* Dibble, 16 N. Y. 203, 212.
[5] U. S. R. S., sec. 1992; Elk *v.* Wilkins, 112 U. S. 94; U. S. *v.* Holliday, 3 Wall. 407.
[6] 3 Kent's Com. 384, 385; *supra*, p. 3.
[7] Martin *v.* Waddell, 16 Pet. 367, 409; Johnson *v.* McIntosh, 8 Wheat. 543.
[8] Cherokee Nation *v.* Georgia, 5 Pet. 1.

supreme government, within whose paramount and, in some aspects, exclusive sovereignty they were permitted to exist. The result of these assertions of power has been the growth of an arbitrary historic code of Indian affairs and laws. The rights and capacity of the Indians, collectively and individually, are therefore matters of State regulation. They are found in the codes of the States or the nation.[1] If not found there, they are, for the purposes of the lawyer, non-existent.

Since the foundation of the State Government the Constitution has declared any purchase or contract of or with the Indians for the sale of lands in this State invalid, unless the same be made under the authority and with the consent of the Legislature.[2] A violation of this inhibition is also penal.[3] The Constitution was at first understood to refer to the tribal lands only,[4] but this conception was subsequently dispelled, and the inhibition extended to all lands belonging to Indians.[5] In 1843 the Legislature authorized any native Indian to take, hold, and convey lands in the same manner as a citizen.[6] Now where such Indian has been naturalized, this act would be unnecessary, and where in conflict with the Constitution, invalid.[7]

Most laws relating to Indians have now been consolidated and the residue to a considerable extent repealed.[8] When an Indian, either by naturalization[9] or by an abandonment of his tribal subjection coupled with the payment of a tax to the support of Government,[10] has become a citizen of the United States, the Indian codes cease to be relevant.

[1] U. S. *v.* Holliday, 3 Wall. 407; Elk *v.* Wilkins, 112 U. S. 94, 108.

[2] Const. 1894–5, Art. I.; Const. 1846, Art. I.; Const. of 1822, Art. VII.

[3] C. 692, Laws of 1893, sec. 384*a*.

[4] Jackson *ex dem.* *v.* Wood, 7 Johns. 290.

[5] Goodell *v.* Jackson, 20 Johns. 693; Lee *v.* Glover, 8 Cow. 189.

[6] C. 87, Laws of 1843; commented on in Elk *v.* Wilkins, 112 U. S. 94, 107.

[7] Cf. Elk *v.* Wilkins, 112 U. S., p. 107.

[8] C. V., New General Laws of N. Y.; c. 679, Laws of 1892, as amended by c. 229 and c. 692, Laws of 1893.

[9] See the acts referred to in Elk *v.* Wilkins, 112 U. S., pp. 103, 104.

[10] Fourteenth Amendment, Const. of U. S.; sec. 1992 U. S. R. S., and U. S. *v.* Elm, 23 Int. Rev. Rec., 419.

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[1] Cf. Act of Assembly, passed March 9th, 1774.

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[1] Cf. Act of March 19th, 1774.

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[1] The reader will also compare c. 53, Laws of 1775.
[2] *Ibid.*
[3] Let the reader compare also recitals in c. 51, Laws of 1775.

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[1] For remedies prior to "Independence," cf. Act of Assembly, passed March 9th, 1774.

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